

A comparative study on the benefits and disadvantages of implementing a wealth tax in South Africa

by

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Declaration

I, Chelesile Nontobeko Matobela, hereby declare that this dissertation is my own, unaided work. It is being submitted in the partial fulfilment of the prerequisites for the degree of Master's in Law at the University of Pretoria. It has not been submitted before for any degree or examination in any other University

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Abstract

Introduction

This dissertation is a study on whether implementing a wealth tax in South Africa is a feasible idea. Those who have suggested this want this tax to be levied on the white race because they benefited more from apartheid.

Research question

My research question is whether implementing a wealth tax will be beneficial or detrimental to South Africa. The question also includes whether a temporary wealth tax, based on race, would assist in narrowing the gap between the rich and the poor and redressing the injustices (whether perceived or real) that resulted from the apartheid system. What must also be addressed is if an indefinite wealth tax, based on an individual's net wealth as applied in other countries, would be beneficial or detrimental if applied in South Africa.

Research methodology

I use a comparative study between countries that have implemented the tax, be they developed or undeveloped, as well as a country that implemented it and then abolished it, in order to establish how it failed. I compare the histories, taxation systems, constitutions, and wealth taxes (if already applied) to reach a conclusion in my analysis of what its potential effect will be if applied in South Africa. Primary, secondary and tertiary sources are utilised as part of my research to answer my research question.

Conclusion

My concluding chapter gives an indication of whether or not I perceive this tax to be beneficial to South Africa.

CHAPTER 1: INTRODUCTION

Tax is a word that seems to leave a bitter taste in many people's mouths. The whole idea of taxation must have developed from somewhere and with good intentions at that; however, the flawed nature of human beings can easily corrupt a good idea into something undesirable. I believe that taxes were originally implemented so as to meet the combined needs of the community; however, due to greed and mal administration, the noble idea that everyone should contribute something for the good of all has been forgotten and distorted. Perhaps it is the selfish nature of mankind that makes us forget to look at the bigger picture. Even a religious book such as the bible requires followers to tithe, i.e. pay 10% for the upkeep of the House of God and those that work and serve in it.

1.1 THE HISTORY OF TAXATION

In previous times, taxes were not as planned and legislated as they are today. People were taxed based on wealth, social position, ownership of land, and amount of slaves owned. Individuals were required to tithe and offer their first fruits. This comes from a religious basis, and as time has passed there has been a separation between the state and religion, and although religious practices still require tithes, the state has undertaken the duty of levying taxes. In a *Short History of Taxation*¹ it is stated that

Opinion in the 1700s to 1800s was represented by three basic ideas that all should pay taxes, a hangover from the seventeenth century that the poor should be exempt on compassionate grounds, and that necessaries should not be taxed for the commercial advantage of keeping wages low.

¹ Sabine, B.E.V. (1980). *A Short History of Taxation*. London: Butterworths, pp. 114.

With wars and territorial conquests, money was required and taxing became the way to assist in obtaining such funds. The citizens of the various countries felt powerless against their rulers and thus lived in poverty while their rulers pursued their interests at their subjects' expense. The power of the church and the rule of law meant that people were afraid to question their rulers as they were told that such powers were of a sovereign nature and thus could not be questioned. It is no surprise that the greatest atrocities have been performed in the name of religion and God when God is highly unlikely to be the author of such, and it is man's own selfishness and greed that has led to such destruction. This is why, perhaps to this day, the idea of paying taxes brings about a sense of indignation in many.

1.1.1 THEORIES OF TAXATION

Usually the government obtains revenue from different sources so as to fund their obligations towards the individuals within the state. With time, most of this revenue is now garnered from taxation. India is said to obtain 80% of its revenue from taxation.

There are two main theories with regard to taxation:

1. The ability theory

This theory is based on an individual's ability to pay taxes. The greater the income, the higher the tax required from the individual. The taxpayer is said to sacrifice a certain amount of money and the following statements need to be noted:

- Equal sacrifice implies that the total loss of utility as a result of tax should be equal for all tax payers. This will involve the rich being taxed more heavily than the poor.
- Equal proportional sacrifice suggests that a fair tax system involves the rich not only in paying more tax but also in losing a greater absolute amount of utility.

- Equal marginal sacrifice implies that the rich should sacrifice a greater proportion of his or her utility. The person with a higher income will bear the most burden. This rule recommends that taxes should be raised in such a manner that after tax everyone has the same income.

This theory should be favourable to lower income earners and those dependant on assistance from the government as it means that they pay less and their richer counterparts will in turn pay more. The ability to pay theory seems to be the one utilised by most countries.

2. The benefit theory

The benefit theory requires people to pay proportionately in terms of how they benefit from the government. It is said to be based on fairness. If one benefits extensively from government services, then one should pay more taxes. This theory does not make much sense to me as it is the indigent and the needy that need assistance from the government the most. According to Scarlett, Lindhal's model² regarding the benefit theory deals with three problems:

- The decision regarding the extent of state activity.
- Allocation of the total expenditure amongst various goods and services.
- Allocation of tax burden among tax payers.

These three problems are the basics of the benefit theory and the questions to be answered by most tax administrators.

² Scarlett (n.d.). *Lindahl Equilibrium and Tax Prices*. Available at <http://www.economictheories.org/2008/12/lindahl-equilibrium-and-tax-prices.html>.

Bowen's model,³ on the other hand, shows how increasing costs correlate with government expenditure. This model is said to be the one favoured in terms of the benefit theory. The benefit theory is favoured by some because in principal one is paying for what one gets out, but some disadvantages have been identified with this theory. These disadvantages are:

- The benefit approach limits the scope of government activities.
- The government can neither support the poor nor take steps to stabilise the economy.
- This theory can be applied only when the beneficiaries can be observed directly. This test is not true for most public services.
- Taxation in accordance with the benefit principle would leave the distribution of real incomes unchanged.⁴

In Davies: Principles of Taxation⁵, it is said that, "A tax ... is a compulsory levy imposed by an organ of government for public purposes. It goes on further to say that,

*Horizontal equity is the idea that people in equal circumstances should pay an equal amount of tax. Vertical equity means that people that are in different circumstances should pay an appropriate different amount of tax.*⁶

³ Cordes, J.J., Ebel, R.D. & Gravelle, J.G. (2005). *Taxation & Tax Policy*. Washington DC: The Urban Institute Press.

⁴ Wikipedia. *Theory of taxation*. <http://en.wikipedia.org/wiki/>.

⁵ Morse, G. & Williams, D. (2000). *Davies: Principles of Tax Law*. 4th Ed. London: Sweet and Maxwell, pp. 3

⁶ Morse, G. & Williams, D. (2000). *Davies: Principles of Tax Law*. 4th Ed. London: Sweet and Maxwell, pp. 6.

Adam Smith, in the *Wealth of Nations*,⁷ expands on these ideas by stating that:

- People should contribute taxes in proportion to their incomes and wealth.
- Taxes should be certain not arbitrary.
- Taxes should be levied in the most convenient way.
- The costs of imposing and collecting taxes should be kept minimal.

There are also different forms of tax. There are the progressive, proportionate and regressive tax forms. The progressive form means that the greater the income, the greater the taxation. The proportionate form means that a flat rate is used to tax an individual. The regressive rate of taxation involves taxing perhaps the first R20 000 of a person's income and the rest of their income is left untouched. This may perhaps lead to other forms of taxation.

With the uncertain economic climate in the world and the world plunged into what is now dubbed the Long Depression of 2008 to 2012, there is unrest from the not so privileged members of society. There has been a call for a wealth tax by Desmond Tutu which is supported by Prof. Geoff Harris, an economics lecturer at the University of Kwa-Zulu Natal⁸, so as to alleviate poverty and bridge the gap between the rich and the poor, especially those affected by apartheid. In this country, the call for a wealth tax has been focused on the white race that is said to have benefited unfairly from apartheid. This sparked my interest as I wondered if those calling for the wealth tax had done much research or had any grounds for such a call. I was also interested in that, despite our efforts at non racial discrimination and reconciliation, after 18 years,

⁷ Smith, A. (1901). *An Inquiry into the Nature and Causes of the Wealth of Nations*. New York: Cosimo Classics.

⁸ Harris, G. *Tutu's wealth tax not a bad idea*. Available at anisa.org.za/.../tutu's_wealth_tax_not_bad_idea_-prof_geoff_harris.

such a call would be made. It seems this was suggested at the Truth and Reconciliation Commission in 1994⁹ but never came to fruition.

It also seems as though South Africa is not the only country calling for the introduction of a temporary wealth tax. Nick Clegg in the UK has called for the introduction of a temporary wealth tax so as to alleviate the effects of the recession and is requesting the wealthy to do their extra bit.¹⁰ Individuals such as Warren Buffet¹¹ and Donald Trump¹² are calling for a wealth tax so as to reduce the debts owed by their country.

Donald Trump¹³ has suggested a once off wealth tax on billionaires at the rate of 14.25% so as to reduce the national debt. Countries such as Germany are experiencing protests with protesters demanding the introduction of a wealth tax.¹⁴ Iceland, which had abolished its wealth tax, after undergoing serious economic hardships in 2008 to 2010, has decided to re- implement the wealth tax in 2010 for a period of four years.¹⁵

The questions are, whether the wealth tax is temporary or indefinite, and does it assist in any way or is it just an extra burden on already heavily taxed taxpayers who will see those funds being mismanaged? Mostly European countries have implemented a

⁹ Republic of South Africa. *Truth and Reconciliation Commission of South Africa Report*. Released on 21 March 2003. <http://www.info.gov.za/otherdocs/2003/trc/>.

¹⁰ Winnett, R. (2012) *Nick Clegg demands an emergency tax on the rich to cope with downturn*. The Telegraph. <http://www.telegraph.co.uk/news/politics/9504926/Nick-Clegg-demands-an-emergency-tax-on-the-rich-to-cope-with-downturn.html>.

¹¹ Berkowitz, B. (2012). *Warren Buffett calls for a minimum tax on the wealthy*. Available at <http://www.reuters.com/article/2012/11/26/us-buffett-tax-idUSBRE8AP0LY20121126>.

¹² Ferry, R. (2011). *Wealth Tax, or "the Wisdom" of Donald Trump*. Available at <http://www.dailykos.com/user/intrados>.

¹³ *Ibid.*

¹⁴ The Tax Page. (n.d.). *Commentary on the Pipeline Decision*. Available at <http://home.germany.net/101-274850/pipecomm.html>, 2012/12/01, commentary on the pipeline decision.

¹⁵ Spectator. (2012). *The dangerous attraction of wealth tax*. Available at <http://blogs.spectator.co.uk/coffeehouse/2012/09/why-wealth-taxes-are-only-superficially-attractive/>.

wealth tax such as France, Iceland and some have abolished it. In Austria and Denmark it was abolished in 1995, in Germany abolished in 1997, in Sweden, 2007 and in Spain 2008.

Adam Smith wrote in *The Wealth of Nations*:¹⁶

“The necessities of life occasion the great expense of the poor. They find it difficult to get food, and the greater part of their little revenue is spent in getting it. The luxuries and vanities of life occasion the principal expense of the rich, and a magnificent house embellishes and sets off to the best advantage all the other luxuries and vanities which they possess. A tax upon house-rents, therefore, would in general fall heaviest upon the rich; and in this sort of inequality there would not, perhaps, be anything very unreasonable. It is not very unreasonable that the rich should contribute to the public expense, not only in proportion to their revenue, but something more than in that proportion.”¹⁷

This perhaps is one person’s way of advocating and justifying a wealth tax.

It has been said that there are three bases for levying taxes:¹⁸

- Income
- Consumption
- Net worth

¹⁶ Smith, A. (1901). *An Inquiry into the Nature and Causes of the Wealth of Nations*. New York: Cosimo Classics.

¹⁷ Smith, A. (1901). *An Inquiry into the Nature and Causes of the Wealth of Nations*. New York: Cosimo Classics.

¹⁸ *Ibid.*

1.2 THE LAW AND TAXATION

Due to a history of wars, dictatorships and abuses of human rights, the rule of law has been examined all over the world and applied so as to prevent the atrocities and injustices of the past. Many countries are now what are called “democratic” countries with voting as a prerequisite for the making of any decision and requiring consensus by the majority. Constitutions have been drafted in many countries to be in line with various conventions on human rights, fairness, and other international agreements.

For a law to be passed, one will find that there must be a vote in parliament with a particular majority required. Before this can even occur, the public is engaged and asked to comment and perhaps vote. Plebiscites and referendums are often taken before decisions and laws are made. This is important to keep peace in the land and to keep in line with the concept of democracy.

South Africa and the implementation of the E-Tolling system¹⁹ is a perfect example of how the public can rebel against a law that they did not have an opportunity to engage with or have a say in. The principles of democracy can be seen with Sanral being taken to court over this matter.²⁰ The fact that individuals can question laws and have the opportunity to fight against something that they believe to be unjust shows how far the concept of democracy has come in this country. One must also consider that the government has tried to push these tolls against the will of the people and this can be seen as an attack on democracy.²¹

With the above in mind, tax laws form part of the legislation of any country. In my study I will look at the constitutions of the relevant countries, or whatever the supreme law of

¹⁹ Serrao, A. (2012). *Brace yourself for e-toll eina*. Available at <http://www.iol.co.za/motoring/industry-news/brace-yourself-for-e-toll-eina-1.1411605>.

²⁰ News24.com. (2012). *SANRAL not ready for tolls, court hears*. Available at <http://www.news24.com/SouthAfrica/News/Sanral-not-ready-for-tolls-court-hears-20120424>.

²¹ *Ibid.*

any land is, so as to determine how taxes, and the wealth tax in particular, fares with this.

1.3 WHAT IS A WEALTH TAX

A wealth tax is defined in Wikipedia²² as,

... a levy based on the aggregate value of all household assets, including owner occupied housing, cash, bank deposits, money funds, savings in insurance, pension plans, investment in real estate, unincorporated businesses, corporate stock, financial securities and personal trusts.

Explained simply, it is a tax on the net wealth of an individual, and this is after all debt has been deducted. Countries that implement the tax may have all the assets listed above or choose to exclude some. For instance in India, pensions are not taxed,²³ and in France only personal assets and not business assets are taxed.²⁴

There is a difference between a wealth tax and a wealth transfer tax. Both are taxes on wealth, but a wealth transfer tax is one which taxes are paid when property exchanges hands. Taxes that fall into this category are inheritance taxes, or estate duty as it is called in South Africa, donation or gift taxes, capital gains tax and even value added tax may fall into this category.

In taxing wealth, it must be established what wealth is. The definition of a wealth tax²⁵ already gives an indication of what wealth is. In an article on reassessing the role for

²² Wikipedia. (n.d.) *Wealth Tax*. Available at http://en.wikipedia.org/wiki/Wealth_tax.

²³ Saini, P.D & Panjwani, V. (2012). Indian Taxation System - A Paradigm Shift. *IJEMR*, 2 (3).

²⁴ Pichet, E. (2010). *France's 2010 ISF Wealth Tax: theory and practice*. 11th Ed. France: Les Éditions du Siècle.

²⁵ Wikipedia. (n.d.) *Wealth Tax*. http://en.wikipedia.org/wiki/Wealth_tax.

wealth transfer taxes, the definition of wealth is given three concepts.²⁶ I will only deal with one concept as it is relevant to my study.

Wealth or W(1) as stated is defined as the cash surrender value of total assets less liabilities and is a measure of the wealth currently available to the household or individual. The assets include owner occupied housing, other real estate, all consumer durables, demand deposits and currency, time and savings deposits, bonds and other financial securities, corporate stock, unincorporated business equity, trust fund equity, the cash surrender value of insurance and the cash surrender value of pensions. Liabilities include mortgage debt, consumer debt, and other debt. Trusts are measured at their actuarial value, which represents roughly fifty percent of the total reserves of trusts. Pensions are measured at their cash surrender value, which represents a very small percentage around five percent of their total reserves. All other tangible and financial assets and liabilities are measured at full value.²⁷

1.4 DOUBLE TAXATION AGREEMENTS

With the application of any tax, there is always a potential for double taxation due to the tax system applied, such as the worldwide system and the source-based system, and this could lead to an individual having to pay taxes on the same assets more than once. Double taxation agreements have been implemented to prevent this.

²⁶ Aaron, A. & Munnell, A. (1992) Reassessing the Role for Wealth Transfer Taxes. *National Tax Journal*, 45 (2).

²⁷ Aaron, A. & Munnell, A. (1992) Reassessing the Role for Wealth Transfer Taxes. *National Tax Journal*, 45 (2) pg. 122.

1.5 ARGUMENTS FOR AND AGAINST A WEALTH TAX

There has been much debate about implementing a wealth tax, and to be honest, there is always a debate on the introduction of any tax. The following arguments will expound on those that believe that the tax should be implemented and those that believe that it should not.

Arguments in favour of a wealth tax

- **Fairness:** This is in line with reducing the gap between the rich and the poor and that the rich have an obligation to assist those that do not have the necessary means. The “beneficiary pay” criterion for tax fairness is used.
- **Revenue:** The tax can increase the amount of revenue received by the government, especially in welfare states where the government is required to assist the indigent. In 1999, Donald Trump suggested that a 14.25% wealth tax be levied on the net wealth of individuals and trusts worth US\$ 10 million or more, so as to eliminate the national debt, to be revenue neutral, to broaden the tax base, to stabilise the economy and to reduce taxes on individual income and other taxes.²⁸
- **Economic growth:** This tax can decrease other tax burdens such as CGT and higher returns can be received from investments from the removal of taxes from profits.
- **Investment:** This tax can be what is called a “negative reinforce” which coerces the productive use of assets. It taxes capital that is not productively employed, and is a tax on the potential income from capital.

²⁸ Ferry, R. (2011). *Wealth Tax, or “the Wisdom” of Donald Trump*. Available at <http://www.dailykos.com/user/intrados>.

- Job creation and social security reform: This tax causes people to productively use their assets and this leads to the requirement of labour, and as a result jobs are created. It can also cut down on job-killing payroll taxes.
- Wealth redistribution: The idea behind this tax is to reduce the gap between the rich and the poor and it may lead to the re-distribution of income.
- Housing and consumer debts: A net wealth tax permits the offset for the full principal debt of any mortgage or loan.
- Social effects: The poor and the middle class will be taxed less and will therefore rely less on government. It also stimulates investment in commercial assets and as a result labour is required.

Arguments against the wealth tax

- Capital flight and brain drain: A wealth tax may unfortunately cause investors and entrepreneurs to leave a country so as to avoid the taxation. Eric Pichet,²⁹ the author of the French Tax Guide, points out that France may have gained 2.6 billion E in revenue but lost 125 billion E in capital flight. This can be avoided, however, with a worldwide-based tax system.
- Valuation: A wealth tax has high management costs for both the tax payer and the administrating authorities.³⁰

With all the above arguments in mind, one must consider whether implementing a wealth tax in South Africa is feasible, be it a temporary wealth tax on one based on

²⁹ Pichet, E. (2010). *France's 2010 ISF Wealth Tax: theory and practice*. 11th Ed. France: Les Éditions du Siècle.

³⁰ Wikipedia. (n.d.). *Wealth Tax*. http://en.wikipedia.org/wiki/Wealth_tax.

redress for apartheid, or an indefinite one not based on race but on a group or class of persons with a particular net worth.

1.6 OVERVIEW OF STUDY

My study consists of six chapters. My first chapter is my introductory chapter, and my second chapter is on countries currently implementing a wealth tax. Originally I intended to just look at the French wealth tax. However, France is a developed country whilst South Africa is a developing country. We can look at developed countries to see how we may get there, but I would also like to look at a developing country that has levied this tax to have an indication as to what the effect on my country will be. In this regard I have included a study of the Indian wealth tax as my third chapter. India is a constitutional country like South Africa that has also had to obtain independence and is thus analogous to South Africa in many ways.

In my fourth chapter I look at a country that previously implemented the wealth tax, Germany, and then abolished it. I examine the reasons why it failed or was removed.

My fifth chapter is a study of the South African Constitution as it is the supreme law of the land, and whether this allows for a wealth tax to be levied on individuals solely based on their race. I also look at other laws that may govern this and if it is valid to add such a law to our country. My study will also look at the socioeconomic state of South Africa and if implementing this tax will be beneficial.

My final chapter will be the concluding chapter that will take the analysis from all the other chapters, and due to comparison, indicate if a wealth tax should be applied in South Africa; whether temporary or indefinite.

CHAPTER 2: COUNTRIES THAT CURRENTLY HAVE A WEALTH TAX

2.1 INTRODUCTION

Some countries have chosen to implement a wealth tax into their taxation system. For some it has been beneficial, and for other perhaps not or no difference can be seen. I study two countries that have implemented a wealth tax and continue to implement it. France is a first world country that has engaged this tax and I will look at why it has done so, how it has been implemented, and if any benefits have been derived from this. India is a “third world” country that has also chosen to implement a wealth tax, and I will study why it has entered into a wealth tax situation and if this has been beneficial. I chose to use these two countries because South Africa is a developing country and if we are to compare the advantages or disadvantages of a wealth tax, then it would be beneficial to look at both a developed and a developing country for insight.

With the 2008 – 2012 recession that the world is currently experiencing, I will delve into the French tax system, although Europe seems to have been hardest hit by this recession. The high rate of unemployment, the failure of banks, huge levels of debt, and increasing unrest in the world is not assisting countries to get back on their feet.

2.2 THE HISTORY OF FRANCE AND TAXATION IN FRANCE

France has a wealth of history which I cannot completely do justice to here. It had a monarchy for a long time and tax burdens on the peasants were very high. In the late 1700s, the peasants were heavily taxed, whilst the clergy and nobles did not have to pay any taxes. This contributed to unrest, and eventually to the French revolution. The famous story of Marie Antoinette and her famous line “Let them eat cake” was characteristic of how the peasants paid much but got nothing in return and the aristocracy seemed oblivious to this.

In the 1800s, there was a reform and the monarchy began to levy taxes against the previously exempt wealthy. This has also progressively changed with the removal of the monarchy, the introduction of a Constitution, and democratic elections. The rich are now taxed at a greater extent, as indicated by the imposed wealth tax.

France has always been known as a super power and a “first world” country. In the 1800s and some parts of the 1900s it has had some political unrest, but finally become a democracy. After the Second World War, France was assisted by Britain and their 2 billion franc debt was erased. They were then lent more money and utilised spoils from Germany to grow their economy.

France has the second largest economy in Europe and the fifth largest economy in the world by nominal figures. France entered the 2008-2012 recession later than the other countries and then also recovered from it earlier than other countries. France has been deemed one of the wealthiest countries in the world, with each individual said to be substantially well off. The government is in debt at the moment, and this could perhaps threaten the wealth of France, but only time will tell. President Francois Hollande has indicated that in 2013, the super-rich will be taxed at an astronomical 75%³¹ so as to assist with reducing the deficit to the budget and increasing revenue. The President intends to increase revenue with as little effect as possible to those that earn less. Whether this will be achieved is yet to be seen. It has been said that this super tax will drive away the wealthy and attract less top executives to the country. This makes sense because I personally would not stay to be taxed at a rate of 75%.

2.3 THE LAW AND TAXATION

France is a constitutional country with a constitution that governs all the laws in the country. The Constitution of France was adopted on the 4th of October 1958 and is

³¹ Lebour, K. (2012). *France's Techies Flap their Wings at Tax Increases With Online "Pigeons" Protest*. Published 26 October. <http://techpresident.com/news/23052/frances-first-social-media-campaign-forces-government-roll-back-proposed-tax-increases>.

currently known as the Constitution of the Fifth Republic.³² Article 1 of the French Constitution says that *the French Republic shall ensure the equality of all citizens before the law without distinction of origin, race or religion.*³³ This equality clause is not broad. and as I am dealing with a wealth tax and if it meets the requirements of the equality clause, the only basis will be that the Republic must ensure the equality of all citizens. Articles 45 to 48 deal with the passing of Finance Bills and Institutional Acts which will include tax laws.³⁴ Article 47 specifically states that,

*Parliament shall pass Finance Bills in the manner provided for by an Institutional Act ... Should the Finance Bill setting out revenue and expenditure for a financial year not be tabled in time for promulgation before the beginning of the year, the Government shall as a matter of urgency ask Parliament for authorization to collect taxes and shall make available by decree the funds needed to meet commitments already voted for.*³⁵

In this regard, taxation is provided for in the Constitution. The Economic, Social and Environmental Council, as mentioned in Articles 69 and 70, may be consulted on economic policies and probably tax law. France is also a member of the European Union and must adhere to this membership as the other countries. Article 88-1 of the Constitution allows for the participation in the European Union. In the Constitutional Law of the European Union,³⁶ it is stated that, “*Member State’s economic policies must contribute to the achievement of the goals of the Community as defined in Article 2 of the E.C Treaty.*” Further,³⁷ it states that, “*In the event that economic policies of a member state are not consistent with the broad guidelines or risk jeopardizing the*

³² Further information available at www.france.fr/.../constitution-fifth-republic/constitution-fifth-republi...

³³ Art 1 of the Constitution of the Fifth Republic (hereinafter known as the Constitution).

³⁴ Art 45-48 of the Constitution of the Fifth Republic (hereinafter known as the Constitution).

³⁵ Art 47 of the Constitution of the Fifth Republic (hereinafter known as the Constitution).

³⁶ As cited by Lenaerts, K. & Van Nuffel, P. (1999). *Constitutional Law of the European Union*. (R. Bray Ed.). London: Sweet & Maxwell, pp. 213.

³⁷ *Ibid*, pp. 214.

proper functioning of the EMU, the council may make secret recommendations to the State concerned”.

Taxation and economic policies go hand in hand, and this shows that the laws enacted by France may be influenced by the European Union as it is a member of this Union. France is one of the few European countries with a wealth tax.³⁸ This tax is said to raise about 2.6 Billion Euros in revenue; however, it has also caused the wealthy to flee and the educated as individuals do not want to be taxed extra for their hard work.³⁹

France applies the progressive tax law system where the higher you are in the tax bracket, the more you are taxed.⁴⁰ France is a welfare state, meaning that there is a high tax burden on the country.

People in France are taxed based on:⁴¹

- Domicile- also known as the principal place of abode. One must stay there for more than 183 days in a calendar year.
- Residency – where the individual’s main residence is.
- If your centre of economic interest is in France.
- If your principal activity or occupation is in France.

³⁸ Le Fefebvre, F. (1990). *Taxes in France*. Boston: Kluwer Law & Taxation Publishers.

³⁹ Lebour, K. (2012). *France's Techies Flap their Wings at Tax Increases With Online "Pigeons" Protest*. Published 26 October. <http://techpresident.com/news/23052/frances-first-social-media-campaign-forces-government-roll-back-proposed-tax-increases>.

⁴⁰ Le Fefebvre, F. (1990). *Taxes in France*. Boston: Kluwer Law & Taxation Publishers.

⁴¹ Le Fefebvre, F. (1990). *Taxes in France*. Boston: Kluwer Law & Taxation Publishers.

It is sufficient to fall under only one of the criteria mentioned to be taxed in France. France also taxes based on your worldwide income, and individuals resident outside France are taxed on the assets that they have in France. The French Tax Code, or the *Code General Des Imports*,⁴² is the basis for levying taxes.

There are different kinds of taxes in France:⁴³

- Corporate tax
- Income tax
- Taxes for social purposes
- VAT
- Excise
- Petroleum Tax
- Succession Tax
- Gift Tax
- Stamps Tax
- CGT
- Wealth Tax

France is a member of the OECD, and the OECD county with the highest tax rate; i.e. 43.3%. Taxation every year is determined by a budget vote by the French parliament.

⁴² Further information available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069577>.

⁴³ Le Fefebvre, F. (1990). *Taxes in France*. Boston: Kluwer Law & Taxation Publishers.

Taxes are levied and collected by the three spheres of government; the central government, local government, and the social security organisation.

The two groups of taxes are the taxes on production and the social contribution taxes which are deducted by employers. Both these groups are then called *obligatoires*.⁴⁴

2.4 THE WEALTH TAX

France collects a wealth tax on individuals with a net worth of 790 000 Euros or more.⁴⁵ This tax is called the *Impot de solidarite sur la fortune*, (ISF) and is an annual tax payable by individuals, the net value of whose wealth exceeds 790 000 Euros.⁴⁶ This is a self assessment tax. It was originally established in 1981 to finance the RMI. This tax was then abolished by Jacques Chirac in 1986 and re-instated in 2008, and collected 4.5 billion in revenue in that year.⁴⁷

There has been a lot of controversy with this tax. On the political side, the left wing thinks that the tax is good and it encourages solidarity, whereas the right wing insists that this tax means that entrepreneurs will leave France or not want to develop businesses there which will lead to higher levels of unemployment.⁴⁸ It must be noted that this tax does not contribute much to the entire revenue; it only contributes 2% of the overall revenue.⁴⁹

⁴⁴ Le Fefebvre, F. (1990). *Taxes in France*. Boston: Kluwer Law & Taxation Publishers.

⁴⁵ Cabinet Gregory. (2012). *French Wealth Tax (ISF) & French Exit Tax*. Available at <http://www.cabinetgregory.com/FRwealthTax.htm>.

⁴⁶ *Ibid.*

⁴⁷ Lebour, K. (2012). *France's Techies Flap their Wings at Tax Increases With Online "Pigeons" Protest*. Published 26 October. <http://techpresident.com/news/23052/frances-first-social-media-campaign-forces-government-roll-back-proposed-tax-increases>.

⁴⁸ *Ibid.*

⁴⁹ Cabinet Gregory. (2012). *French Wealth Tax (ISF) & French Exit Tax*. Available at <http://www.cabinetgregory.com/FRwealthTax.htm>.

France uses a world wide system of taxation.⁵⁰ Thus residents of France have to pay a wealth tax on their world wide assets, and non-residents of France have to pay a wealth tax on their assets in France. This tax is levied per household in France and only on personal assets and not business assets. Households include married couples and couples that have entered into registered notarial agreements and are known as PACS (*Pacte Civil de Solidarite*). It also applies to members of the household who are over the age of 18. A French resident may apply for a 30% reduction of this tax.⁵¹

The *Bouclier Fiscal*, or tax shield as it is known, limits the amount that an individual may be taxed at to not more than 50%. Income tax, local taxes, wealth tax and social charges are taken into account. One may claim refunds if one has been overtaxed. If an individual has just moved to France, for the first five years, non-French based assets are excluded from the wealth tax. In July 2012 a *contribution exceptionnelle* was introduced and will affect tax payers with a net wealth of over 1.3 Million Euros.⁵²

The Wealth Tax rates as of 2011⁵³ are as follows:

0 to 790 000 Euros	0.00%
790 000 to 1 290 000	0.55%
1 290 000 to 2 530 000	0.75%
2 530 000 to 3 980 000	1.00%
3 980 000 to 7 600 000	1.30%
7 600 000 to 16 540 000	1.65%

⁵⁰ Le Fefebvre, F. (1990). *Taxes in France*. Boston: Kluwer Law & Taxation Publishers.

⁵¹ Cabinet Gregory. (2012). *French Wealth Tax (ISF) & French Exit Tax*. Available at <http://www.cabinetgregory.com/FRwealthTax.htm>.

⁵² *Ibid.*

⁵³ *Ibid.*

Above 16 540 000

1.80%

Possessions such as motor vehicles, jewellery, furniture, antiques, art, property and financial assets need to be included.

Deductions are permissible at 30% of the current value of the main residence, 30% of each furnished rental property, and 20% of each unfurnished rental property. Other deductions are permissible, such as income tax for previous years, property taxes, life insurances, pension schemes and certain investment funds.⁵⁴ French individuals are said to be the richest per capita, and due to this, the wealth tax may have succeeded. There was a call to remove this tax; however, the not so wealthy are in favour of the tax as it does not affect them adversely in any way. This tax has been seen as a means to shorten the gap between the rich and the poor.

France may have succeeded at this as it seems that the gap has been lessened and it is now one of the wealthiest nations. It should be noted that France, especially Paris, is one of the most expensive places in the world to live in and the high levels of taxation may have contributed to this.

I consider taxes such as inheritance taxes and gift taxes as taxes on wealth, although not specifically defined as a wealth tax. There are also taxes on luxury items and this I consider to be a tax on wealth.

2.5 DOUBLE TAXATION

With the implementation of a wealth tax, especially based on a worldwide residence system, the possibility of double taxation arises. Double taxation agreements (DTAs) are then entered into so as to prevent the double taxation.

⁵⁴ Cabinet Gregory. (2012). *French Wealth Tax (ISF) & French Exit Tax*. Available at <http://www.cabinetgregory.com/FRwealthTax.htm>.

For instance, France and the UK have a double taxation agreement to prevent the double taxation of individuals with tax burdens in both countries.⁵⁵ Articles 52 and 53 of the French Constitution include the negotiation and ratification of treaties.⁵⁶ The power to negotiate and ratify treaties is given to the President. Double taxation agreements fall under this. An example of a Double Tax Agreement is the Double Tax Agreement between France and India.⁵⁷ Both countries tax on a worldwide basis and levy a wealth tax. An individual could be unfortunate enough to pay taxes in both countries, but the DTA prevents this from happening by governing how taxes will be levied in circumstances where an individual may be taxed in both countries.

Article 2 of the DTA between France and India stipulates that the Convention applies to wealth taxes in both countries.⁵⁸ Article 25 of this Convention deals with the elimination of Double Taxation by inducing the deduction, credit and exemption methods as forms of prevention for double taxation.⁵⁹

Austria, Germany, Italy, Spain and the United Kingdom have treaties with France that exempt members of those states from having their assets outside of France levied with a wealth tax if the particular individual is a resident of France.

2.6 THE BENEFITS AND DISADVANTAGES OF THE WEALTH TAX IN FRANCE

The wealth tax in France has brought a lot of reports of doom, although France has one of the strongest economies in Europe. It is said to be leading to a capital and brain drain which I can understand because there is no individual that wants to pay a high

⁵⁵ Double Taxation Agreement Between France and the United Kingdom.

⁵⁶ Arts 52 to 53 of the Constitution of the Fifth Republic.

⁵⁷ Art 2 of the Double Taxation Agreement between France and India.

⁵⁸ Art 2 of the Double Taxation Agreement between France and India.

⁵⁹ Art 25 of the Double Taxation Agreement between France and India.

amount of taxes on their hard work. Another issue is that investors are said to be leaving France as a result.

However, France is a welfare state and it is to be expected that the taxes will be high for the government to meet its obligations to the members of the state. The solidarity tax, in addition to all other taxes, places a high tax burden on France. However, the pension and medical benefits in France are substantial in comparison with those of other countries. In line with the “ability to pay theory”, sacrifices have to be made by the rich for the greater good. In light of the above, it seems this high taxation is beneficial to the lower income earners and offers some form of stability.

2.7 OVERVIEW

France is a developed country and one of the wealthiest countries in the world with individuals having a significantly good standard of living per capita. This must be considered when looking at their implementation of a wealth tax. It may not affect the wealthy to the degree it would in developing countries. France’s economy has also been strong for a long time, and as one of the colonialists they would have benefited financially from its colonies, although it may not have any at the moment.

This background of a strong economy means that the French are better equipped at handling a wealth tax. As I pointed out earlier, France entered the recession much later than other countries and also came out of it earlier. This strong economic base has helped France to be the strong country that it is.

CHAPTER 3: INDIA

3.1 INTRODUCTION

India is a developing country. It has a Constitution which is the supreme law of the land. It was enacted in 1949 and is the longest Constitution in the world. Since it is the supreme law of the land, all laws enacted must be in line with the Constitution. The authority to levy taxes in India is derived from the Constitution. Like South Africa, India has an Income Tax Act.

3.2 THE HISTORY OF INDIA AND OF TAXATION IN INDIA

India was a British colony until 1950 when it gained independence and was established as a democratic state with a Constitution. At the end of colonial rule, India inherited an economy that was one of the poorest in the developing world. The majority of people in India are poor. It has shown an improvement over the years, as poverty has dropped from 42% of its population in 2005 to 33% in 2010.⁶⁰

India has one of the largest populations in the world. The country had problems with corruption, and this was a result of tight government control and regulations over many things. This control has since improved but corruption is still a problem. India has since developed into the third largest and one of the fastest growing economies in the world. There is a very wide gap between the rich and the poor. In times past some of the Indian tribes were even deemed to be slaves, such as the Tamil people from South India. Prime Minister Nehru brought reforms to women, children and caste classification rights. He introduced a socialist economic model to India where Indian farmers were not taxed.

⁶⁰ Shah, A. (2010). *Poverty facts and stats*. Available at <http://www.globalissues.org/article/26/poverty-facts-and-stats>.

Due to the wide gap between the rich and the poor and the number of protests that occurred as a result, a Wealth Tax Act was enacted on 1 April 1957.

The phrase quoted by Kalidas in Raghuvansh eulogising King Dalip says, “*It was only for the good of his subjects that he collected taxes from them, just as the sun draws moisture from the earth to give it back a thousand fold.*”⁶¹ This was the basis of the concept of taxation in India. The system of direct taxation in India has been in force since ancient times although it has evolved. Taxes started out being collected as part of agricultural production, and over time with the development of money, coins and cash were then collected. After 1922, taxation became more formalised and tax boards and committees came into being, leading up to the current tax laws and departments.

3.3 THE LAW AND TAXATION

India is a constitutional country. Its Constitution is the supreme law of the land, enacted on 26 November 1949 and coming into effect on 26 January 1950. It is the world’s longest constitution. It is this Constitution that guarantees equality in Article 14 which is an important factor in my study of the wealth tax.⁶²

The Preamble states that one of the Constitution’s objectives is to secure social economic and political justice for all. Considering that a wealth tax is usually enacted to reduce the gap between the rich and the poor, this would understandably be in line with social and economic justice. Article 265 of the Indian Constitution states that, “*No tax shall be levied or collected except by authority of the law.*”⁶³ A person is defined as any being whom the law regards as capable of rights or duties.⁶⁴

⁶¹ Saini, P.D & Panjwani, V. (2012). Indian Taxation System - A Paradigm Shift. *IJEMR*, 2 (3).

⁶² Art 14 of the Constitution of India.

⁶³ Art 265 of the Constitution of India; Seervai, H.M. (1991). *Constitutional Law of India*, 4th

This means that individuals are capable of the duty of taxation. The central, state and municipal governments levy the taxes. Each tax levied in India must be authorised by a law passed by the Parliament or State Legislature.

Article 246 of the Constitution gives these spheres of government the authority to draft and pass all legislation and legislation with regard to taxes.⁶⁵

The Parliament may levy the following taxes:⁶⁶

- Income tax
- Customs and export duties
- Excise duties on tobacco, alcohol, opium, Indian hemp and narcotics
- Corporation tax
- Taxes on capital value of assets
- Estate duty
- Duties on succession to property
- Terminal taxes on goods or passengers travelling by railway, sea or air
- Taxes on newspapers
- Taxes on goods other than newspapers
- Taxes on the consignment of goods
- All residuary types of taxes

State government may levy the following taxes:⁶⁷

Edition, Silver Jubilee Ed., Volume 1. Bombay: Tripathi Private Limited.

⁶⁴ Seervai, H.M. (1968). *Constitutional Law of India: A Critical Commentary with Supplement, Volume 1*. Bombay: N.M Tripathi Private Limited.

⁶⁵ Art 246 of the Constitution of India.

⁶⁶ Seervai, H.M. (1991). *Constitutional Law of India*, 4th Edition, Silver Jubilee Ed., Volume 1. Bombay: Tripathi Private Limited.

⁶⁷ *Ibid.*

- Land revenue
- Taxes on agricultural income
- Duties on succession to agricultural income
- Estate duty on agricultural income
- Taxes on lands and buildings
- Taxes on mineral rights
- Duties on goods produced and manufactured in the state
- Taxes on the entry of goods into a local area
- Taxes on the consumption or sale of electricity
- Taxes on the purchase or sale of goods other than newspapers
- Taxes on other advertisements
- Taxes on goods or passengers carried by roads or inland waterways
- Taxes on vehicles suitable for use on roads
- Taxes on animals and boats
- Tolls
- Taxes on professions, trades or employment
- Capitation taxes
- Taxes on luxuries
- Stamp duty

India has a large rural population and hence the large number of taxes on agriculture.

India has the following legislation available for taxation.⁶⁸

- the Income Tax Act of 1961
- The Wealth Tax Act of 1957
- Expenditure Tax Act 29 of 1957
- Various Finance Acts

⁶⁸ Seervai, H.M. (1991). *Constitutional Law of India*, 4th Edition, Silver Jubilee Ed., Volume 1. Bombay: Tripathi Private Limited.

The Direct Taxes Code will soon be implemented to replace the Income Tax Act and the Wealth Tax Act. This may be effective from 2013 or 2014.⁶⁹

3.4 THE WEALTH TAX

The purpose of the wealth tax is to tax unproductive assets and to bridge the gap between the rich and the poor. The tax is levied under the Wealth Tax Act of 1957. This tax is a direct tax. It is always levied for one complete financial year. An individual on whom a wealth tax is levied is known as an assessee.⁷⁰ The wealth tax is levied at a rate of 1% for assets exceeding Rs.15 Lacs.

The scope of liability to wealth tax is as follows:⁷¹

- a. *In the case of an individual who is a citizen of India and resident in India, a resident—HUF and company resident in India; Wealth tax is chargeable on net wealth comprising of*
 - i. *All assets in India and outside India;*
 - ii. *All debts in India and outside India are deductible in computing the net wealth.*
- b. *In the case of an individual who is a citizen of India but non-resident in India or not ordinarily resident in India, HUF, non-resident or not ordinarily resident in India and a company non-resident in India;*
 - i. *All assets in India except loans and debts interest whereon is exempt from income-tax under section 10 of the Income Tax Act are chargeable to tax.*
 - ii. *All debts in India are deductible in computing the net wealth.*

⁶⁹ Tax Guru. (2012). *Direct Tax and Service Tax Proposals 2012-2013*. Available at <http://taxguru.in/service-tax/analysis-direct-tax-service-tax-proposals-20122013.html>.

⁷⁰ Sec 2 of the Wealth Tax Act of 1957.

⁷¹ Tax India. (n.d.). *Wealth Tax in India*. Available at <http://tax-india.com/wealth-tax/wealth-tax-in-india/>.

- iii. *All assets and debts outside India are out of the scope of Wealth Tax Act.*
- c. *In the case of an individual who is not a citizen of India whether resident, non-resident or not ordinarily resident in India: Same as in (b):”*

The individuals liable to the wealth tax are the following:⁷²

- An individual person
- A group of people who own a property
- A company or organisation
- A Hindu undivided family (HUF)
- Person belongs to 1-by -6 categories
- A representative or heir of a dead person
- Non corporative tax payer

India therefore taxes on a worldwide basis of taxation. Residents are taxed on their net worth in India or outside of India. Non-residents are taxed on their assets in India. Section 2 of the Wealth Tax Act deals specifically with what may be taxed.

The assets that may be taxed in terms of section 2 (e) (a) are:

(1) *Any building or land appurtenant thereto which shall include.*⁷³

- commercial buildings;*
- residential buildings;*
- any guest house;*
- A farm house situated within 25 kilometres from the local limits of any municipality (whether known as Municipality, Municipal Corporation or by any other name) or a Cantonment Board.*⁷⁴

⁷² Seervai, H.M. (1991). *Constitutional Law of India*, 4th Edition, Silver Jubilee Ed., Volume 1. Bombay: Tripathi Private Limited.

⁷³ *Ibid.*

However, the following buildings will not be included to assets:⁷⁵

- i. *a house meant for residential purposes which is allotted by a company to an employee or an officer or a director who is in whole time employment, having a gross annual salary of less than Rs. 5,00,000/-.*
- ii. *any house for residential or commercial purposes which forms part of stock-in-trade;*
- iii. *Any house which the assessee may occupy for the purposes of any business of profession carried on by him.*

The following buildings shall also not be an asset:

- a. *Any residential property that has been let out for a minimum period of 300 days in the previous year.*
- b. *Any property in the nature of commercial establishments or complexes.*

(2) Motor Cars (excluding those used by the assessee in the business of running them on hire or as stock-in-trade).⁷⁶

(3) Jewellery, bullion, furniture, utensils or any other, article made wholly or partly of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals ⁷⁷(excluding those held as stock-in-trade by the assessee). Jewellery includes:

- i. *ornaments made of gold, silver, platinum or any other precious metal of any alloy containing one or more of such precious metals, whether or not” containing any precious or semi-precious stones, and whether or not set in any furniture, utensils or other article or worked or sewn into any wearing apparel;*

⁷⁴ Sec 2 (ea) (1) of the Wealth Tax Act of 1957.

⁷⁵ Seervai, H.M. (1991). *Constitutional Law of India*, 4th Edition, Silver Jubilee Ed., Volume 1. Bombay: Tripathi Private Limited.

⁷⁶ Sec 2(ea) (2) of the Wealth Tax Act of 1957.

⁷⁷ Sec 2(ea) (iii) of the Wealth Tax ACT OF 1957.

- ii. *Precious or semi-precious stones, whether or not set in any furniture, utensils or other articles or worked or sewn into any wearing apparel.*⁷⁸

*(4) Yachts, boats and aircrafts (excluding those used by the assessee for commercial purposes).*⁷⁹

(5) Urban land; "Urban Land" means land situated:

- i. *in any area which is comprised within the jurisdiction of a local authority and which has a population of not less than ten thousand according to the last proceeding census of which the relevant figures have been published before the valuation date; or*
- ii. *any area within such distance, not being more than eight kilometers from the local limits of a local authority as the Central Government may, having regard to the extent, and scope for urbanization of that may, and other relevant considerations, specify in this behalf by notification in the Official Gazette.*⁸⁰

However, the following urban land shall not be included in assets;

- i. *land on which construction of a building is not permissible under any law for the time being in force in the area in which such land is situated;*
- ii. *land occupied by any building which has been constructed with the approval of the appropriate authority;*
- iii. *Any unused land held by the assessee for industrial purposes for a period of two years from the date of its acquisition by him.*
- iv. *Land held by an assessee as stock-in-trade for a period of five years from the date of its acquisition by him. (Ten years).*

Note: Agricultural land situated in urban area is not liable to wealth-tax.

⁷⁸ Sec 2(ea) (iii) of the Wealth Tax ACT OF 1957, Explanation 1.

⁷⁹ Sec 2 (ea) (iv) of the Wealth Tax Act of 1957

⁸⁰ Sec 2 (ea) (v) of the Wealth Tax Act of 1957.

(6) *Cash in hand;*

- a. *In case of an individual and HUF cash in hand in excess of Rs. 50,000/- shall be included in assets.*
- b. *In cash of any other person cash in hand not recorded in the books of account shall be included in assets⁸¹*

In terms of section 4(1) (a) of the Wealth Tax Act of 1957, the following assets are deemed to be assets that will be taxable:

- a. *Assets transferred by one spouse or another.*
- b. *Assets held by minor children. Whether the assets are held by a physically or mentally handicapped minor child (specified in section SOU of the Income Tax Act) such assets will not be clubbed with the net wealth of the parent. In such a case the net wealth of the handicapped minor child shall be determined separately and assessee in his hands.*
- c. *Assets transferred to a person or an Association of Persons for immediate or deferred benefit of the transferor, his or her spouse without adequate consideration.*
- d. *Assets transferred under revocable transfer.*
- e. *Assets transferred to son's wife. Assets transferred to a person or Association of Persons for the benefit of son's wife.⁸²*

Section 5 of the Wealth Tax Act states that the following assets are exempt from a wealth tax:

- a. *Property held under a trust or other legal obligation for any public purpose of a charitable or religious nature in India subject to the satisfaction of the stipulated conditions;*

⁸¹ Sec 2(ea) (vi) of the Wealth Tax Act of 1957.

⁸² Sec 4(1) (a) of the Wealth Tax Act of 1957.

- b. Coparcenary interest in a HUF property;
- c. One residential building belonging to a former Ruler;
- d. Former Ruler's jewellery (excluding his personal jewellery) which has been recognized as a heirloom by the Central Government before 1.4.1957 or by the CBDT after that date
- e. Assets belonging to the Indian repatriates for 7 years on fulfilment of the conditions prescribed;
- f. One house or part of a house (with effect from 1.4.1999 one house or part of a house or a plot of land) belonging to an individual or HUF is exempt from Wealth Tax.
- g. A company registered under section 25 of the Companies act of 1956.
- h. A co-operative society 1.
- i. A social club.
- j. A political party
- k. A mutual fund specified under section 10(23D) of the Income Tax Act of 1968.⁸³

A non-resident of India but who is a citizen of India or a person of Indian origin who intends to settle permanently in India is exempt from paying a wealth tax where certain assets are concerned and for seven years. These assets are:⁸⁴

- Money taken into India
- Value of assets taken in
- Money in an NRE account in India
- Value of assets raised from cash indicated in the first and third points.

⁸³ Sec 5 of the Wealth Tax Act of 1957.

⁸⁴ Seervai, H.M. (1991). *Constitutional Law of India*, 4th Edition, Silver Jubilee Ed., Volume 1. Bombay: Tripathi Private Limited.

3.5 DOUBLE TAXATION

Due to its diverse taxes and act of taxing residents on a worldwide basis, the possibility of double taxation is always at hand. Like most countries, India has entered into double taxation agreements to prevent this. It has a double taxation agreement with France as explained above, and with Germany, amongst other countries. These agreements are based on the OECD model and the exemption, deduction and credit methods are utilised to prevent double taxation with the specific countries.

In India, the Income Tax Department enforces the application of the Double Taxation Agreements. India used to have a government that did not engage in many international agreements. However, it is stated that, *“For quite a long time some people, politicians and others, professed not to see anything but the written word, and rejected the Conventions altogether.”*⁸⁵ The present government is engaging in International activity and entering into Double Taxation Agreements.

3.6 THE BENEFITS AND DISADVANTAGES OF A WEALTH TAX IN INDIA

India is a developing country and not many developing countries have implemented a wealth tax. There is a large rural population and due to classification in times past when money/tax was required to be given to the privileged, there is a large gap between the rich and the poor. The introduction of a wealth tax is assisting with this, and the Indian economy is growing rapidly. It has even been said to have grown by 200% in the 2000s, so they must be doing something right and the wealth tax must have benefited them. I have not found conclusive data between the correlation of a wealth tax and the economic growth; however, the study of economics does show that taxes have a definite effect on the growth or decline of an economy.

⁸⁵ Noorani, A.G. (2000). *Constitutional Questions in India: The President, Parliament & States*. Oxford: Oxford University Press, pp. 53.

3.7 OVERVIEW

It should be noted that in comparison with the French wealth tax, business assets are also taxed; it is not just personal assets that are taxed. The Indian Wealth Tax Act⁸⁶ is far more comprehensive than the French version of the wealth tax.

India has one of the fastest growing economies in the world but has one of the highest public debts, and also high inflation. It is now seen as a quickly rising superpower due to its economic reforms and is expected to exceed France and Germany in growth by 2020; perhaps become the third largest economy in the world by 2035, but only time will tell.

The Indian Wealth Tax is more comprehensive than the French one. India is one of the few developing countries to implement a wealth tax and it seems to be working for them. The rate of poverty has decreased, but the high levels of corruption could perhaps affect the effective utilisation of revenue.

⁸⁶ 1957.

CHAPTER 4: GERMANY

4.1 INTRODUCTION

Germany is a country that had a wealth tax which was then found to be unconstitutional and thus abolished in 1997. It has a very strong economy and has been included in my study as a potential indicator of why a wealth tax can be abolished and if it was effective at all at some point. Germany can be said to have been an aggressive country, being the instigator of many wars, but despite this it has managed to improve its economy and has one of the strongest economies in Europe.

4.2 THE HISTORY OF GERMANY AND THAT OF TAXATION IN GERMANY

Germany is a country with a rich history. It has survived the loss of two world wars which devastated its economy, but has somehow managed to pick itself up over the years. After the First World War in 1917, it had to pay reparations to the winning countries and it lost its colonies and was partially occupied. This was a heavy blow to the German economy. The Great Depression came in the 1930s and devastated Germany. The Second World War occurred and Germany lost again. Germany was then split into East and West Germany. In the 1950s West Germany had the strongest economy in Western Europe. In 1990 East and West Germany were united. Germany then became one of the founding members of the Eurozone and has one of the strongest economies in Europe. In 2012, Germany tried to assist with the difficulties being experienced by the continent of Europe. How did this country, after so much adversity, manage to rise up and have one of the strongest economies in Europe?

Germany was the first state in Europe under Bismark. Upon pressure from the labour party, taxes were introduced. Further taxes were levied to fund the First and Second World Wars. These taxes were high, but the two wars resulted in the formulation of the social taxes. When Germany was reunited, further taxes were levied so as to assist in

the build up of East Germany. Germany eventually developed a high tax burden of about 50%, largely as a result of it being a welfare state.

4.3 THE LAW AND TAXATION

Germany has a Constitution called the Basic Law which was enacted in 1949. This Constitution is the supreme law of the land. It has established Germany as a parliamentary democracy with legislative, executive and judicial branches. There is also a separation of powers. Germany has a Constitutional Court where law or conduct not in line with the Constitution is declared invalid.

Kammers notes in *The Constitutional Jurisprudence of the Federal Republic of Germany* that,

*The Bonn Basic Law, wrote Ernest Karl Rakuscher, does not reflect a specific economic system. Thus it is lawful for legislature to pursue any economic policy which it deems feasible...all economic policies must be enacted within the limits and light of the values of the Constitution.*⁸⁷

The Constitutional Court in Germany found the wealth tax to be unconstitutional. Legislature may not draft any law as they see fit; these laws must be in line with the Constitution as is commonly the requirement with Constitutional countries. The *Interpretation of Tax Law and Treaties and Transfer Pricing in Germany* states that,

*Both civil law and tax law are statutes of the same order, tax law being a field of legislation in its own right, subject only to the Constitution.*⁸⁸

⁸⁷ Kamers, D.P. (1997). *The Constitutional Jurisprudence of the Federal Republic of Germany*. 2nd Ed. Durham & London: Duke University Press, pp. 249.

⁸⁸ Lehner, M. (1998). *Interpretation of Tax Law and Treaties and Transfer Pricing in Japan and Germany*. K. Vogel (Ed.). Series in International Taxation. The Hague: Kluwer Law

Taxes in Germany are levied by the federal government. Like many countries, there are different forms of taxes. It is fascinating that the German word for tax, *die Steuer*, is the same as the word for help, and considering the true purpose of taxes, this would be appropriate. The Constitution sets out the principles of taxation. These principles are:

- Art 2; Para 1 and Art 20 Para 3: the lawfulness of taxation.⁸⁹
- Art 3, Para 1: the ability to pay principle. This principle was discussed in the introductory chapter.⁹⁰
- Art 3; Para 1: equality in taxation.
- Art 20: the welfare state principle.

Taxes are divided between what the federation receives, what the states receive, and what the municipalities or districts receive.⁹¹ The federation and the states make decisions as to what the tax laws are. There are federal tax authorities and state tax authorities.

The Federation receives:

- Customs taxes
- Taxes on alcopops, cars, distilled beverages, coffee, mineral oil products, sparkling wine, electricity, tobacco and insurances.
- Supplement on income taxes- solidarity surcharge.

International.

⁸⁹ Art 2 Para 1 of the Basic law for the Republic of Germany.

⁹⁰ Art 3 Para 1 of the Basic Law for the Republic of Germany?

⁹¹ Art 105 of the Basic Law for the Republic of Germany.

States receive:

- Inheritance tax, real property transfer tax
- Taxes on beer and gambling
- Fire protection tax

Municipalities receive:

- Real property taxes
- Taxes on beverages, dogs and inns.⁹²

Most of the revenue is received from income tax and Value Added Tax. Apparently there is tax that is compensation between rich and poor states. This appears to me as a form of a wealth tax, although Germany abolished its wealth tax in 1997. Germany taxes on a worldwide basis. This means that if you are a resident of Germany, you will be taxed on your income in Germany and on assets outside of Germany. Residents have full income tax liability. If one is a non-resident, one is only taxed if the income has a close domestic German context, including income from permanent establishments and from real estate. There are six tax groups or classes, and seven different types of income to be taxed.

The classes are:⁹³

- Tax Bracket 1 : single
- Tax Bracket 2: single parent

⁹² Art 106 of the Basic Law of the Republic of Germany.

⁹³ Make it in Germany. (n.d.). *Working in Germany*. Available at <http://www.make-it-in-germany.com/en/work/ratgeber-arbeiten-in-deutschland/>.

- Tax Bracket 3: married and spouse has no income or lower income
- Tax Bracket 4: married and similar income to spouse
- Tax Bracket 5: married and spouse has higher income
- Tax Bracket 6: if one has a second job

The seven different types of income to be taxed are:⁹⁴

- Income from agriculture and forestry
- Income from business operations
- Income from self- employed work
- Income from employed work
- Income from capital
- Income from letting property
- Miscellaneous income

Germany uses the progressive rate of taxation, meaning that the higher your income, the greater an individual is taxed. If an unmarried person has an income of 8.004 Euros, then no income tax is levied. Married couples with an income of 16, 008 Euros are also exempt from paying income tax. The German tax burden is quite high, with most individuals paying close to 50% of their income on taxes. This is probably due to the fact that Germany is a welfare state and much revenue is required by the government to cover this.

⁹⁴ *Ibid.*

In an article on the effective taxation of top incomes in Germany, it was said:

*“The effective marginal rate for high incomes was found and estimated to be sixteen percent points below the legislated one and it was concluded that much tax difference was due to tax avoidance...”*⁹⁵

A high tax burden can lead to tax avoidance as taxpayers may begin to feel exploited.

4.4 THE WEALTH TAX

Germany had a wealth tax applied under the Wealth Tax Law called *Vermogensteuergesetz* (VStG). This tax worked hand in hand with what was known as the Valuation Law; i.e. the *Bewertungsgesetz* (BewG). The General Tax Code (*Abgabenordnung*) also assists with regards to net worth taxes. Like all net worth or wealth taxes, this tax was only levied on an individual's net worth. It was levied on individuals and businesses, i.e. natural persons and legal persons, at 1% annually for natural persons and 0.6% for legal persons.⁹⁶ The wealth tax was abolished in 1997 by a decision of the Federal Constitutional Court on 22 June 1995).^{97 98}

In Germany the worldwide basis of taxation is applied. This means that residents of Germany are taxed on their assets regardless of where they are in the world. Non-residents are taxed on assets within Germany. Section 2(1) no 2 of the *Vermogensteuergesetz* (Net Wealth Law) provided that non-resident companies and

⁹⁵ Bach, S., Corneo, G. & Steiner, V. (2011). *Effective Taxation of Top Incomes in Germany*. Available at http://www.wiwiiss.fu-berlin.de/institute/finanzen/corneo/dp/BCS_EffectTaxRate_2011-06-20.pdf.

⁹⁶ Kiiesewetter *et al.* (2008). Who Has Really Paid For the Reconstruction of East Germany? Expected and Realized Returns on Real Estate Investments in East and West Germany in the 1900s. *Official Open Access Journal of VHB*, 2 (1).

⁹⁷ Lomas, U. (2012). Germany's SPD Drafts Wealth Tax Bill. *Tax-News*. Available at http://www.tax-news.com/news/Germanys_SPD_Drafts_Wealth_Tax_Bill____55634.html.

⁹⁸ Thuronyi, V. (2003). *Comparative Tax Law*. Alphen aan den Rijn: Kluwer Law International, pp. 82.

individuals had to pay a wealth tax on property within Germany.⁹⁹ According to section 121 no 3 of the *Bewertungsgesetz* (Valuation Law), a non-resident company only pays wealth tax if it has a permanent establishment within Germany.¹⁰⁰ Sections 12 and 13 of the General Tax Code (*Abgabenordnung*) explain the requirements for something to be classified as a permanent establishment.¹⁰¹

The net wealth tax was later found to be unconstitutional for a number of reasons:¹⁰²

- It went against the principle of equality. Article 13 of the German Constitution states that, “(1) All people are equal before the law...(3) Nobody shall be prejudiced or favoured because of their sex, birth, race...”¹⁰³ It was found that the valuation rules as applied produced different values for the properties and which also differed from the market values.
- The constitutional protection of liberty prohibited confiscatory taxation. Individuals should not be taxed more than 50% of their income, all taxes included.
- The family must be protected as the continuity of the institution of marriage and family has to be respected.

Article 3(1), as explained in the Constitutional Jurisprudence of the Federal Republic of Germany, bans arbitrary and unreasonable legislative classifications.¹⁰⁴

⁹⁹ Section 2(1) no 2 of the *Vermogensteuergesetz* (Net Wealth Law).

¹⁰⁰ Section 121 no 3 of the *Bewertungsgesetz* (Valuation Law).

¹⁰¹ Section 12 and 13 of the General Tax Code (*Abgabenordnung*).

¹⁰² Federal Constitutional Court 4 of 22 June 1995 (European Commission) (ed) 2005, pp. 12.

¹⁰³ Art 13 of the Basic Law of the Federation of Germany.

¹⁰⁴ Kamers, D.P. (1989). *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham & London: Duke University Press, pp. 89.

4.5 DOUBLE TAXATION

Like all countries, double taxation is always an issue. There can be unilateral relief or bilateral relief for double taxation. I will focus on the bilateral relief and the double taxation agreements. Germany has a number of Double Taxation Agreements with other countries. Some of these will apply only in part, due to the abolishment of the wealth tax in Germany. For example, Germany has a DTA with India that governs how Indian residents with French assets or French residents with Indian assets will be taxed, considering that both countries' taxation system is the worldwide basis.

As with most DTAs, the credit, deduction and exemption methods are used as means to prevent double taxation. The pipeline case decision in 1996¹⁰⁵ is an indicator of the importance of Double Taxation Agreements, especially where net wealth taxes are concerned. This one dealt with the DTA between the Netherlands and Germany, and section 2(1) no 2 of the Net Wealth Tax and permanent establishments, or rather whether a pipeline counts as a permanent establishment.¹⁰⁶ The decision itself is no longer important, but rather the importance of a DTA when dealing with wealth taxes levied on a worldwide system for residents and source-based system for non-residents.

The case of *Werner v Finanzamt Aachen-Innenstadt* dealt with the issue of residency and sections 7 and 52 of the EEC Treaty in determining whether the complainant was a resident. The EEC Treaty¹⁰⁷ is not a DTA but can also be used to ascertain rules dealing with international law.

¹⁰⁵ The Tax Page. (n.d.). *Commentary on the Pipeline Decision*. Available at <http://home.germany.net/101-274850/pipecomm.html>, 2012/12/01, commentary on the pipeline decision.

¹⁰⁶ *Ibid.*

¹⁰⁷ Europa: summaries of EU Legislation. (n.d.). Treaty establishing the European Economic Community, EEC Treaty - original text (non-consolidated version). Available at http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm.

The case of *Saint Gobain v Finanzamt Aachen – Innenstadt* highlighted the same issues but with the Article 234 of the EC Treaty being scrutinised.¹⁰⁸

4.6 THE BENEFITS AND DISADVANTAGES OF THE WEALTH TAX IN GERMANY

In September 2012, thousands protested in Germany and demanded the re-introduction of a wealth tax. Opposition parties have called for a 1% wealth tax on those with assets over two million, and have indicated that this tax is low enough for the rich not to feel it but high enough for government to raise 1.5 billion in revenue.¹⁰⁹ Martin Lenz, the head of the National Tax Department at Germany's KPMG auditing and advisory firm, states that, "... *hardly any appreciable assets would be left after subtracting the administrative costs of the wealth tax. Both the taxpayers and the fiscal authorities' costs must be considered.*"¹¹⁰

Due to the recession, some countries such as Iceland have opted to re-introduce the wealth tax. Iceland in 2010 re-introduced its wealth tax temporarily for four years. The United Kingdom has been considering introducing a wealth tax and a mansions tax. It will perhaps assist the lower income earners, as the present Prime Minister in a meeting with cabinet pointed out that a low income earner, with an unemployed spouse and two children pays about 73% taxes on their total income. This means that if an individual earns one pound, they take home 27p and the tax burden on the poor should not be so high.¹¹¹ However, he has not conclusively confirmed the wealth tax and has been seen to contradict himself by criticising the proposed 75% tax on the super rich in

¹⁰⁸ *Saint Gobain v Finanzamt Aachen-Innenstadt* C 307/97.

¹⁰⁹ Lohmüller, M. (2012.) *Would a wealth tax be effective?* Available at <http://www.dw.de/would-a-wealth-tax-be-effective/a-16282381>.

¹¹⁰ As cited by Lohmüller, M. (2012.) *Would a wealth tax be effective?* Available at <http://www.dw.de/would-a-wealth-tax-be-effective/a-16282381>.

¹¹¹ Winnett, R. (2012) *Nick Clegg demands an emergency tax on the rich to cope with downturn*. The Telegraph. <http://www.telegraph.co.uk/news/politics/9504926/Nick-Clegg-demands-an-emergency-tax-on-the-rich-to-cope-with-downturn.html>.

France by indicating that the rich who would like to leave France are welcome in the UK.

One must consider that the wealth tax was previously abandoned in Germany for being unconstitutional, difficult, and expensive to administer. The rates applied were said not to correlate with market values at the end of the day. It was also found not to adhere to the principal of equality and it limited ownership and inheritance rights of those that wished to pass on their property to heirs. In an article on why the wealth tax was abandoned in the UK it is stated that,

*The relative importance of inherited wealth, compared to wealth amassed over a lifetime, has also begun to grow recently in countries for which we have good long term data.*¹¹²

In the New Challenges to the German Basic Law, page 91, it is stated that,

*The social state of Germany aims at social justice as a solution to the tensions between the individual and the common world alongside the red rope of equality of chance.*¹¹³

Germany is a social state, also known as a welfare state, and social justice and equality require that everyone be treated equally. However it can also be argued that it is social justice for the rich to contribute more taxes as they can afford it and it will lower the taxes on the poor who already can not afford so much. How these obstacles will be overcome has not been explored. If a wealth tax is to be implemented, the Constitution must be adhered to.

¹¹² Glennester, H. (2012) Why was a wealth tax for the UK abandoned? Lessons for the policy, process and tackling wealth inequality. *Journal of Social Policy*, 41 (2) 233-249.

¹¹³ International Association of Constitutional Law (1991) *New Challenges to the German Basic Law; The German Contributions to the Third World Congress of the International Association of Constitutional Law*. Baden-Baden: Verlagsgesellschaft Madsack GmbH & Co.

If this tax had been exceedingly beneficial to the economy prior to 1997, then the government would have found a way to make it work. However, 15 years have passed before it was even considered again, and it is only being considered due to the economic crises and pressure from lower income earners. Should it be re-implemented, it is yet to be seen whether it will be advantageous to Germany. In an article on German public finances, it was said that businesses are sensitive to tax changes, even in the short run.¹¹⁴ This is why perhaps the wealth tax was not missed as it impacted negatively on businesses.

4.7 OVERVIEW

Germany has a high tax burden on its people. They are, however, adequately covered when it comes to issues such as pension. Whether the wealth tax they intend to implement will be beneficial is yet to be seen. It has been difficult to find information on the German wealth tax due to the lack German law at the library and a distinct lack of information on the internet on wealth tax. Whether the wealth tax was previously beneficial or not cannot be established, but considering that it was abolished in 1997 and no efforts until recently were made to re-establish it, it probably did not add that much to the economy.

¹¹⁴ Von Hagen, J., Strauch, R., Bunger, K. (2005). *Long Term Budget Challenge: Public Finance and Fiscal Sustainability of the G7*. Paper prepared for the International Conference, Washington DC, 2-4 June. [Online] Available at <http://www.irpp.org/events/archive/jun05/bunger.pdf>.

CHAPTER 5: SOUTH AFRICA

5.1 INTRODUCTION

With any injustice in the world, there will always be someone or a group of people that will be disadvantaged. In South Africa apartheid was the aggressor that led to racial discrimination. During the apartheid era, black people were not allowed the same benefits as their fellow white counterparts. 1994 saw the beginning of a new era where everyone was equal before the eyes of the law. The unfortunate thing about any discrimination that has been perpetuated against any kind of people for a long time is that although it may end, redressing the injustices that have held people back for so long may take some time.

5.2 THE HISTORY OF SOUTH AFRICA AND THAT OF TAXATION IN SOUTH AFRICA

The Truth and Reconciliation Commission¹¹⁵ was among many commissions that were created to see the country move forward. This commission, however, allowed anyone to come out and confess any wrongdoing that they had done and they would be forgiven without prosecution. The spirit behind all this was forgiveness and not revenge. The Interim and the final Constitution were drafted and made law, and attempted to address all areas of discrimination, and it seemed as though a new light had dawned over South Africa and over Africa as a whole.

Eighteen years later we are now faced with strikes and demonstrations all over again but with a different focus. People are demanding proper service delivery and higher wages, amongst many other issues. They feel that government has not delivered to

¹¹⁵ Republic of South Africa. (2003). *Truth and Reconciliation Commission of South Africa Report*. Released on 21 March 2003. Available at <http://www.info.gov.za/otherdocs/2003/trc/>.

them the promises that were made, and the anger about this is simmering leading to God knows what. It is in this time that there has been a call for a wealth tax by the likes of Desmond Tutu.¹¹⁶ This is music to the ears of the poor but is this suggestion a feasible way of dealing with the problems we have in this country, or is it that despite the high amount of taxes that people are already paying, there seems to be a mal administration of finances? Will this tax not be collected and just end up in someone's pockets?

5.3 THE LAW AND TAXATION

One must also consider looking at everything from a Constitutional perspective. It is no longer the ideas of an individual or group of persons that governs the land but the law must be supreme. Section 2 of the Constitution tells us that the Constitution is the supreme law of the land and that law or conduct inconsistent with it is invalid.¹¹⁷ Therefore before we can establish any law or change the Income Tax Act or the new Tax Administration Act, we must establish if the conduct we are engaging in is in line with the Constitution.

5.3.1 *The Constitution of 1996*

Section 7 of the Constitution states that

(1) This Bill of Rights is a corner stone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

¹¹⁶ Harris, G. *Tutu's wealth tax not a bad idea.*
anisa.org.za/.../tutu's_wealth_tax_not_bad_idea_-prof_geoff_harris.

¹¹⁷ Section 2 of the Constitution of the Republic of South Africa.

*(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.*¹¹⁸

Section 7 gives us an expose of what to expect in the Bill of Rights, which is section 1 to 36 of the Constitution of 1996. Section 8(1) of the Constitution tells us that, “*The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state*”.¹¹⁹ It is evident from section 1, 7 and 8 that heed must be taken of the Bill of Rights and the Constitution at all spheres, including law making.

Section 9 the equality clause of the Bill of Rights states that:

*(1) everyone is equal before the law and has the right to equal protection and benefit of the law*¹²⁰

In light of this subsection, the term “everyone” is used. With regards to the rules of interpretation, the ordinary meaning of the word is utilised and “everyone” would mean all with the exception of none. This includes black people and white people, post- and pre-apartheid. When looking at this subsection, it means that all races are equal before the law and should be equally, without differentiation, protected by the law.

*(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.*¹²¹

This section applies to people that have previously been discriminated against and implementing means to uplift them to the same positions as other people.

¹¹⁸ Section 7 of the Constitution of 1996

¹¹⁹ Section 8 of the Constitution of 1996.

¹²⁰ Section 9 of the Constitution of 1996.

¹²¹ Section 9(2) of the Constitution of 1996.

Categories such as Affirmative Action (AA) would fall under this as women have previously been discriminated against, and Affirmative Action, although it shows preference for a particular sex, race and people with disabilities, is fair in that the results of the previous discrimination against that sphere of individuals must be redressed. Affirmative Action is mostly seen in the workplace. The Affirmative Action in Anti-Discrimination Law and Policy states that “*Employment discrimination has always been a prime target of civil rights advocacy*”.¹²² The Employment Equity Act¹²³ is legislation designed to advance persons previously disadvantaged by unfair discrimination.

In an article written by Goga Farhana,¹²⁴ she states that,

Affirmative Action elevates the status of the perpetual underclass and its aim is to redress past wrongs and restore equal access to the benefits of society. It is therefore aimed at equalizing the past.

It is the evident that Affirmative Action is in line with section 9(2) of the Constitution as it is to address the injustices of the past that have led to certain sections of society being underprivileged. Wikipedia describes affirmative action as,

*... policies that take factors including race, color, religion, gender, sexual orientation, or national origin into consideration in order to benefit an underrepresented group” in areas of employment, education, and business, usually justified as countering the effects of a history of discrimination.*¹²⁵

¹²² Leiter, S. & Leiter, W.M. (2002). *Affirmative Action in Antidiscrimination Law & Policy: An Overview & Synthesis*. New York: State University of New York Press. pp. 35.

¹²³ No. 55 of 1998.

¹²⁴ Farhana, G. (2007). *A Critique of Affirmative Action: The Concept*. Available at http://ccms.ukzn.ac.za/index.php?option=com_content&task=view&id=683&Itemid=86.

¹²⁵ Wikipedia. (n.d.). *Affirmative Action*. Available at www.Wikipedia.org.

In the Bill of Rights Hand Book, it is said that “*Affirmative Action is not an exception to equality, but is a means of achieving equality understood in its substantive or restitutory sense.*”¹²⁶

Black Economic Empowerment (BEE) is another system that has been implemented to redress the discrimination of the past. The Broad-based Black Economic Empowerment Act of 2003 is another piece of legislation that was established to redress the wrongs of the past. It even goes further to differentiate between black men and women. In the Bill of Rights handbook it is said that,

*... apartheid systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as “white”senior jobs and access to established schools and universities were denied to them... The deep scars of this appalling programme are still visible in our society*¹²⁷

Section 9 of the Constitution, BEE and AA all try to address these various issues.

A lot of criticism has been given with regards to section 9(2) of the Constitution and legislation that has been implemented to act along with this section. It has been said that Affirmative Action and BEE have been abused. Apparently with AA comes a lowering in the standard of performance and the quality of employees, due to people being employed solely on their race or gender. BEE is also said to have been abused with companies employing under-qualified individuals who fall under BEE so as to obtain the points given with it and perhaps also tenders.

¹²⁶ Currie, I. & De Waal, J. (2005). *Bill of Rights Hand Book*. 5th Edition. Cape Town: Juta.

¹²⁷ Currie, I. & De Waal, J. (2005). *Bill of Rights Hand Book*. 5th Edition. Cape Town: Juta, pp. 231

Should a wealth tax be introduced on white people, it would probably fall under this section of the Constitution as its purpose is to tax those that benefited from apartheid and redress the wrongs of the past.

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*¹²⁸

This subsection deals with the grounds of discrimination that are forbidden. Race, ethnicity and colour are forbidden grounds.

*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*¹²⁹

However, the term “unfairly” means that there can also be fair discrimination. One must now look at what constitutes fair and unfair discrimination. This will also coincide with section 9(2) that allows for discrimination that is deemed fair and has allowed for BEE and AA. In the case of *President of the Republic of South Africa v Hugo*, pardon was given to women with children under the age of 12, and a certain father complained that this discriminated against men as he had a child under 12. However it was found that most women are care givers of children and have suffered and grown less in society as a result, and thus this discrimination was found to be fair.¹³⁰

¹²⁸ Section 9(3) of the Constitution of 1996

¹²⁹ Section 9(4) of the Constitution of 1996.

¹³⁰ *President of the Republic of South Africa v Hugo* 1996 (4) SA 1012 (D).

5.3.2 The Promotion of Equality and Prevention of Unfair Discrimination Act

This section further goes on to say that “*National legislation must be enacted to prevent or prohibit unfair discrimination.*”¹³¹ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUD) is a piece of legislation that was enacted to prevent or prohibit unfair discrimination. The first part of the Act tells us that the Act is to give effect to section 9 of the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality, and eliminate unfair discrimination. The objectives of the Act in section 2 clearly state that this Act is to give effect to section 9 of the Constitution and to promote equality.¹³²

Section 7 of the Act, states that “*No person may discriminate against any person on the ground of race.*”¹³³ Section 5 of the Act states that “*This Act binds the State and all persons.*”¹³⁴ Section 44 of the Constitution vests the National Assembly with the power to pass legislation.¹³⁵ The National Assembly is the state and is required to adhere to section 7 of the PEPUD Act. It would be the National Assembly that would pass legislation or amend the new Tax Administration Act so that it allows for a wealth tax.

*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*¹³⁶

¹³¹ Section 9(4) of the Constitution of the Republic of South Africa.

¹³² Section 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹³³ Section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹³⁴ Section 5 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹³⁵ Section 44 of the Constitution of 1996.

¹³⁶ Section 9(5) of the Constitution of 1996.

The determination of whether discrimination is fair or unfair is adduced in section 14 of PEPUDA. Section 14 states that:

*(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups and categories of persons.*¹³⁷

This section is in line with section 9(2) of the Constitution where it is required to advance persons previously disadvantaged by a system. This section can be utilised should there be a dispute relating to whether the introduction of a wealth tax is unfair discrimination as this tax will only apply to those that benefited from apartheid, and to be more specific, the white members of this country. What has not been established is where the cut off point is. Will it be the elderly people who are taxed or the younger people on account of their race or perhaps that their parents benefited?

(1) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

- (a) The context;*
- (b) The factors referred to in subsection (3);*
- (c) Whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned;*

(2) The factors referred to in subsection (2) (b) include the following:

- (a) Whether the discrimination impairs or is likely to impair human dignity.*
- (b) The impact or likely impact of the discrimination on the complainant.*
- (c) The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to group that suffers from such patterns of disadvantage;*
- (d) The nature and extent of the discrimination;*

¹³⁷ Section 2(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

- (e) Whether the discrimination is systemic in nature;*
- (f) Whether the discrimination has a legitimate purpose;*
- (g) Whether and to what extent the discrimination achieves its purpose;*
- (h) Whether there are less restrictive and less advantageous means to achieve the purpose;*
- (i) Whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-*
 - (1) Address the disadvantage which arises from or is related to one or more of the prohibited grounds; or*
 - (2) Accommodate diversity.¹³⁸*

Before subsection 2 can be discussed, subsection 3 has to be discussed. Will the introduction of a wealth tax impair the dignity of the white counterparts? One will have to discuss what dignity entails and see if one can be put to shame by paying this tax. It can perhaps be said to do this because one is in essence making a particular race pay for the sins of the past and disregarding the reconciliatory spirit with which we began at the dawn of the new dispensation.

- The impact or likely impact of the discrimination on the white race is not measurable at the moment. It has been suggested that this wealth tax will be an annual tax for two years at the end of every year on the net worth of white South Africans at 2% or 3%.
- The position of white persons in society at the moment is interesting. They have not previously suffered from discrimination or been underprivileged, but due to BEE and AA, it has become very difficult for a white young man to get a job at this point.
- The nature and extent of the discrimination will be that it will discriminate based on race and also on the net worth of an individual. It has not been established whether

¹³⁸ Section 14 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

individuals earning less than a certain cap amount will be excluded from this tax or not.

- The discrimination will not be systemic in nature, and as it seems, will be allocated for a specific period and not permanently.
- Does this form of discrimination have a legitimate purpose? Well, this depends on how one considers this. According to those calling for a wealth tax, it will supposedly alleviate poverty and add to the state resources that will assist tax payers and non taxpayers. However, I believe that the government already receives more than enough money from taxes but they do not allocate these funds well and corruption also plays a hand in the financial troubles plaguing this country. One can also look at it in that the recession has had a hand in the financial woes of many countries, and as a result our country has also suffered.
- Whether, and to what extent, this discrimination achieves its purpose – This will only be seen should a wealth tax be implemented. As of the present we can only theoretically look at the benefits or downfalls of introducing this tax.
- Whether there are less restrictive and disadvantageous means to achieve this purpose – This is highly probable. As I have stated before, monies received from current taxes should be more than enough to meet all the requirements if those funds were allocated properly. However mis-administration and mal administration have led to the many woes we are facing today.
- The last part deals with whether the disadvantages arising from the prohibited ground relating to race will be addressed. This is covered by section 9(2) of the Constitution and 14 (1) of the PEPUDA, in that there is to be redress for those previously discriminated against.
- In terms of PEPUDA, section 14(1) is more than enough to cover the introduction of a wealth tax on white persons in this country.

In the case of *Haksen v Lane* NO 1998(1) SA 300 (CC), para 53 as taken from the Bill of Rights Hand Book, a three stage enquiry was established in determining discrimination.

- (a) *Does the challenged law or conduct differentiate between people or categories of people? Is so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then it is a violation of section 9(1).*
- (b) *Does the discrimination amount to unfair discrimination? This requires a two stage analysis:*
- (1) *Does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
- (2) *If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to be on a specified ground, then unfairness will be presumed....The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of enquiry, the differentiation is found not to be unfair, then there will be no violation of sections 9 (3) and (4).*
- (c) *If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.*¹³⁹

All rights in the Bill of Rights may be limited in terms of section 36 of the Constitution.

¹³⁹ *Haksen v Lane* NO 1998 (1) SA 300 (CC) Para 53.

Section 36 of the Constitution states that:

- (1) *The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
- (a) *The nature of the right*
 - (b) *The importance of the purpose of the limitation*
 - (c) *The nature and extent of the limitation*
 - (d) *The relation between the limitation and its purpose*
 - (e) *Less restrictive means to achieve the purpose.*
- (2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*¹⁴⁰

5.3.3 Discussion on section 36

Section 36, also known as the limitations clause, is alike in many ways to section 14(3) of PEPUDA. It looks at the nature of the right, and in this case, the right in question is equality and discrimination based on race.

- The importance of the purpose of the limitation. The limitation is there to address poverty and to redress the discrimination and wrongs of the past and this is seen as important.
- The nature and extent of the limitation. As discussed before, the wealth tax will only be for a prescribed period and on only the white race that benefited from apartheid.

¹⁴⁰ Section 36 of the Constitution of 1996.

- The relation between the limitation and its purpose is obviously that this tax on the white race will have arisen as a result of benefits obtained from apartheid.
- Less restrictive means to achieve this purpose. As I stated earlier, should the tax funds already available be utilised in an economical way, then there would probably be no requirement for a wealth tax, and the government would be able to achieve all the goals required. This could be naively stated by me and due to my lack of experience; I will perhaps change my mind about this statement in a few years time.
- Subsection (1) of section 36 states that only a law of general application may limit any of the rights in the Bill of Rights. The Income Tax Act and the Tax Administration Acts are laws of general application, and should a wealth tax be introduced, it may be as a result of an amendment on an introduction of a new section in these Acts. There could perhaps be a separate law of general application or piece of legislation introduced to implement the wealth tax.
- Subsection (1) further looks at the fact that the limitation should be reasonable and justifiable in an open and democratic society, and based on human dignity, equality and freedom. One should then consider whether the implementation of a wealth tax in South Africa is deemed as reasonable. Considering the poverty and the high rate of unemployment, a wealth tax to obtain more funds to assist the indigent would be understandable. However, 18 years after 1994, could it be said to be justifiable to introduce this tax now? Perhaps countries such as the United States of America should be considered, who many years after the Civil Rights Movement still struggle with issues such as racial inequality and the races that suffered then still seem to be suffering now and not progressing as much as they should have. We, only after 18 years, should not be too quick to say that so much time has lapsed. If a so called “first world country” like the United States still struggles due to previous and current racial inequalities, we cannot obviously say that everything has been sorted out in our country.

- The next part says that it must be in an open and democratic society. This means that people's opinions must be obtained before the introduction of a wealth tax, and should the majority agree, it should be implemented. Should the majority disagree, then it should not be implemented. This should not be similar to the E-Toll issue we are facing now where the majority is not in agreement with this system but the government seems to be ignoring the calls of the majority, and thus ignoring the concept of democracy in this implementation.
- Factors such as human dignity, equality, and freedom must be taken into account. Equality is the strongest factor here as we are dealing with treating one race differently from another race, and therefore the unequal treatment can be said to infringe on the equality requirement. However, it was discussed earlier in terms of what grounds it is fair to treat someone differently, such as the grounds of race (i.e. AA).

In an article on the Constitutional Court's approach to the limitations analyses in the socioeconomic rights cases, the role section 36 is discussed in light of the case of *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*. It is the minority judgment that considers section 36 in its judgment. It is, however, of concern to the author that the conclusion that was reached did not ascertain that the conduct of the state amounted to unfair discrimination.¹⁴¹

The Bill of Rights Hand Book states that the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as being based on "race, colour, descent or national or ethnic origin".¹⁴² Section 233 of the

¹⁴¹ James, C. (2012). *The Constitutional Court's Approach to the Limitations Analyses in Socioeconomic Rights Cases*. Available at <http://www.inkundlajournal.org/inkundla/2012-inkundla-1>.

¹⁴² Currie, I. & De Waal, J. (2005). *Bill of Rights Hand Book*. 5th Edition. Cape Town: Juta, pp. 249,

Constitution tells us that when interpreting the law, an interpretation favourable to international law must be preferred and that foreign law must be considered.¹⁴³

The implementation of this wealth tax may be deemed to be reverse discrimination by some; however, if this is justifiable and is not of a permanent occurrence, perhaps it can be considered. In the case of *Pretoria City Council v Walker*,¹⁴⁴ it was found that although the discrimination based on race was there, it was however found to be fair due to the circumstances, and that the black residents of Mamelodi and Atteridgeville were previously disadvantaged, whereas “old Pretoria” had mostly white residents that were not previously disadvantaged.

5.4 THE WEALTH TAX

There is no wealth tax applicable yet in South Africa, although we have wealth transfer taxes such as estate duty, donations tax and capital gains tax.

5.5 DOUBLE TAXATION

Double taxation is a taxation issue in every country. Although we have not implemented a wealth tax yet, we still have double taxation agreements with regards to our other taxes, and should the wealth tax be implemented, double taxation will be an issue. South Africa taxes on a worldwide basis of taxation. This is one of the causes of potential double taxation as residents will not only be taxed on their assets in South Africa but also on assets in other countries. The South African Constitution and the current Income Tax Act make allowance for South Africa to enter into tax treaties that become a part of domestic law in terms of section 108 (2) of the Income Tax Act and are thus binding on South Africa.

¹⁴³ Section 233 of the Constitution of 1996.

¹⁴⁴ *Pretoria City Council v Walker* (3) BCLR 257 (CC). 1.

5.6 THE POTENTIAL BENEFITS AND DISADVANTAGES OF HAVING A WEALTH TAX IN SOUTH AFRICA

My problem with the introduction of a wealth tax is that I feel people are already being taxed so much. With estate duty tax at 20%, one fifth of the entire estate, which I believe is a form of a wealth tax, donations tax, and the fact that the higher up you go in the tax bracket, the greater you will be taxed, capital gains tax is another form of a wealth tax. In addition to all this, there is the introduction of the E-Tolling system which is another form of tax.

It will not just affect road users, but the price of food will go up due to delivery and transportation costs going up. Those who catch taxis will have to pay increased fares and I am sure many other areas of our lives will suffer too. With all this in mind, is the tax burden on individuals in this country not already too high? We also have to watch corruption and the misuse of funds. Even the bible says “Give to Caesar what belongs to Caesar” but if “Caesar” is taking more than what is due to him then we have a problem.¹⁴⁵

My other concern is that we seem to be developing a country where people feel as though the government owes them so much. What happened to working for your bread? All I see is people singing and dancing and demanding this and that. I do not see anyone demanding free education, and skills of some sort, but rather that the government should give them material possessions. Perhaps we are a socialist state or a welfare state like the United Kingdom with the dole. But in that country they have a problem with people who refuse to go to school and to work and choose to live off the government. We need to be careful that we do not produce a generation with a sense of entitlement and no work ethic whatsoever. Will the introduction of a wealth tax not perpetuate this idea of receiving handouts from the government?

¹⁴⁵ Mark 12 v 17, King James Bible.

I can understand where old people or completely impoverished people are concerned, but I think that developing a system where people constantly want help will cost us as a young and developing country. Perhaps looking at this from a political perspective will assist and not just in analysing one political party as all political parties make all sorts of promises. To the masses, these promises sound good, especially if you are impoverished, but the consequences of these promises also need to be analysed.

An issue to be looked at, is should a wealth tax be introduced not based on race, at what rate and who will be taxed? Do we have people in this country with enough wealth to say that a wealth tax can be applied? South Africa has a large gap between the rich and the poor, and ways must be found to shorten this gap. Perhaps a wealth tax on the rich will narrow this gap, but we can only study this theoretically as only the establishment of this tax will tell if it is a feasible idea in this country. A wealth tax as explained is a tax on the net worth of certain individuals. A cap amount is usually set at which one will qualify to be taxed with this tax.

5.7 OVERVIEW

With the above in mind, South Africa is a developing country, and one must consider whether the individuals, white or any other race, can afford a higher tax burden. One must also look at whether this tax will be beneficial in the long run. With corruption a problem, the tax may be collected but end up in someone's pocket. South Africa has some of the tendencies of a welfare or a social state, but whether we are one is not completely clear. The government does give disability grants and grants to the elderly and for children, and this may be regarded as welfare actions. However, should we fully become a welfare state, the taxes levied in this country will increase exponentially.

The Constitution must also be considered as we are a constitutional state not acting on the whims and desires of individuals. The principals of equality and non-racialism are fundamental and part of the Bill of Rights and must be regarded in a serious light.

CHAPTER 6: CONCLUSION

6.1 INTRODUCTION

This chapter will cover all the countries discussed, and from it draw conclusions regarding the effectiveness of a wealth tax. This is a comparative study and comparison must be made between all the countries mentioned and South Africa to determine if it is feasible to implement a wealth tax in South Africa. They say a wise man seeks council before going to war, and although we are not going to war, council must be obtained so as to make the best decision possible. Only a fool will not consider all options and strategise before making a decision that will be the most advantageous and correct, and that is what I endeavour to do with this study. When dealing with the introduction of any tax, it is stated that, “*A tax in whatever form it is produced to a pronounced degree has to withstand a barrage of brickbats, catcalls and downright opposition.*”¹⁴⁶

Many African countries are failing because of corruption, greed, selfishness, and a simple lack of planning. Some ideas are implemented without the proper research and study made on the particular idea, which leads to a waste of money, time and at the end of the day, and whatever other resources are available. It is admirable that one can improve from being a tea person to president as in a certain African country, but the sudden rise in status with preparation; information and education is one of the problems we have in Africa. They say that power and money corrupts. If one did not have anything, and suddenly has all these things are available, the door to misuse of funds, theft and corruption is then left open.

In Mozambique, direct taxes accounted for 20% of the revenue, and indirect taxes accounted for 46% of the revenue in 1986.¹⁴⁷ A wealth tax is a direct tax and one must

¹⁴⁶ Monroe, H.H. (1981). *The Hamlyn Lectures, Thirty-Third Series; Intolerable Inquisition? Reflection on the Law of Tax*. London: Stevens & Sons.

¹⁴⁷ Arndt, C. & Torp, F. (Eds.). (2009). *Taxation in a Low Income Economy: The case of*

consider that South Africa, being an African country like Mozambique, may potentially not produce much from a direct tax such as a wealth tax.

Perhaps South Africa will have a different story. In the current political and economic climate, it almost seems as though we are heading in a similar direction as other African countries, and this is discouraging because with the dawn of 1994 and the Constitution it seemed as though we were an African country that would be a shining example to the rest of the continent. Perhaps this will all change, but our ways of running countries and not just our tax systems needs to drastically improve.

6.2 THE HISTORIES OF THE DIFFERENT COUNTRIES AND THAT OF TAXATION

This research consists of a study of four different countries. Two of these countries are developed countries, and the other two are developing countries. Developing countries can look to developed countries to find a way in which to emerge from poverty and to progressively improve the running of the country. Because all people are flawed, and it is the flawed people that run the countries, this will of course never be perfect.

6.2.1 France and South Africa

France is a European country and has a wealth of history as a monarchy and then revolutions as the people rebelled against the need to pay taxes. Despite all this, France has grown to be one of the most progressive and wealthiest European countries. France has a president, and the taxes that are being applied now are levied by the government and must be in line with a Constitution. In times past, the monarchy or some unilateral person decided on the amount of taxation that individuals should pay.

Mozambique. Boston: Taylor & Francis Group.

France also obtained assistance from the United Kingdom, had their debts cancelled after the Second World War, and obtained loans from the International Monetary Fund. All these have helped to put France where it is now. The spoils of victory from the Second World War also catapulted France into taking an economic lead.

In comparison, South Africa was colonised by the Netherlands and the British. Due to apartheid, sanctions were levied on this country that affected its economy as a number of countries refused to trade with it. There was a brain and capital drain, due to those who feared the apartheid government leaving for greener pastures, and those that left just after 1994 fearing the loss of their high posts. After 1994, the economy picked up again and the world was once again open to South Africa. Taxes in South Africa were levied according to the different homelands; however, much of the tax system from the apartheid era still remains. The Income Tax Act of 1958 was still in use until the promulgation of the new Tax Administration Act in October 2012.

In comparison with France, which is developed nation and has had a head start, our histories are obviously different, with France not being colonised after 1945 and not having to deal with apartheid; thus our systems are not as advanced as theirs. The French also have a larger number of wealthier and educated people than we do.

6.2.2 India and South Africa

India is a developing country like South Africa. It was colonised as South Africa was, and is a nation even more diverse in culture than South Africa. India obtained its independence sooner than South Africa, but has, however, been characterised by sectarian violence and assassinations. Its economic and taxation policies seem to have worked for them as they are now one of the fastest growing countries in the world, and it is predicted to be a super power in the near future. India is a good example for South Africa because there are so many similarities in our history.

6.2.3 Germany and South Africa

Germany is a developed country but has been through a lot of turmoil with the loss of two World Wars and having to pay war compensation that adversely affected their economy. The German taxation system also originally began with a monarchy. In comparison, South Africa has suffered much in the past, being an African country, previously colonised, and having an apartheid system imposed on it. Interestingly, racism is also an issue in Germany.

However, in comparison with South Africa, Germany has had a longer time to recover and to pick itself up. It also has more educated people. South Africa has not only had the issue of sorting out economic issues, but social issues such as lack of education and poverty. German history does not seem to influence them as much, or to have had an impact on their current economic climate, and perhaps this is due to the passage of time since the wars and the re-unification of Germany. East and West Germany were only re-united in 1990, four years before the end of apartheid in South Africa. It must be noted, however, that West Germany already had a much stronger economy and had to assist East Germany in rebuilding its economy.

6.3 THE LAW AND TAXATION

France, India, Germany and South Africa are all constitutional countries. In these countries, the Constitution is the supreme law of the land and must be adhered to in regard to all laws, including taxation. Even during the Interim Constitution of 1993, tax legislation had to be in line with the Constitution. The Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa¹⁴⁸ came into being so as to ensure that provisions were constitutional.

¹⁴⁸ Republic of South Africa. (1999). *Ninth Interim Report of The Commission of Inquiry into Certain Aspects of The Tax Structure of South Africa*. Available at <http://www.treasury.gov.za/publications/other/katz/9.pdf>.

The report's aims were to:¹⁴⁹

- a) *Identify instances where it is likely that existing provisions in fiscal legislation violate the Constitution.*
- b) *Assist in the process of ensuring that fiscal legislation in South Africa will comply with the spirit, purpose and object of the Constitution.*
- c) *Assist by providing some guidance for the avoidance of disputes.*

The French Constitution came into being in 1958, the Basic Law of Germany was enacted in 1949, the Indian Constitution came into effect in 1950 although it was enacted in 1949, and South Africa's Final Constitution was enacted in 1996. South Africa has had its Constitution come into being much later than the other countries due to apartheid.

The tax laws in all these mentioned countries are constitutionally given authority, and should they not be in line with the relevant Constitution then they will be declared invalid. French tax laws, and all other laws, are promulgated by parliament. This is the same with India, Germany and South Africa. It must be noted that the Indian Constitution has been said to have been the most amended Constitution; perhaps this is why it is the longest Constitution in the world. The Constitutions of France, Germany and South Africa are not easily amended. In the German Constitution certain provisions can never be amended. Germany, India and South Africa have gone through oppressive situations and circumstances arose as a result of provisions that were not in the Constitutions or provisions that could easily be altered, and that has made these countries cautious.

All these countries have diverse taxes, including South Africa. This shows that South Africa is trying to keep up with international standards. The names of some of the taxes may differ, with estate duty being called an inheritance tax in France, Germany

¹⁴⁹ Republic of South Africa. (1999). *Ninth Interim Report of The Commission of Inquiry into Certain Aspects of The Tax Structure of South Africa*. Available at <http://www.treasury.gov.za/publications/other/katz/9.pdf>.

and India. Donations tax is called a gift tax in the related countries, and capital gains tax has the same name in all four countries. South Africa continues to levy income tax, customs and excise, amongst many other taxes; also found in the three countries of comparison. The rate of taxation in South Africa is lower than the other three as they also levy taxes such as a wealth tax which increases the tax burden on individuals.

6.4 THE WEALTH TAX

6.4.1 France and South Africa

France is a developed nation currently implementing a wealth tax. The French economy is very strong and has not suffered as much as most European countries during the recession. It is a very rich nation, as pointed out above, and the earnings *per capita* are quite high. France's wealth tax, i.e. taxes at over 800 000 Euros, is about R63 000, which is not much. This would mean that if applied in this manner in South Africa, every household or individual with a net wealth over R63 000 would have to pay a wealth tax. R63 000 is not much, and this would include middle class people; a problem currently being experienced by the French people. This is perhaps why it may have been leading to a brain drain, as middle class persons are normally those in professions or people who have not inherited fortunes but have worked hard for their money. In saying this I am not despising the inheritance of a fortune because someone had to work hard for that fortune, although it may not be the particular holder of the wealth at that moment.

The French wealth tax is not based on racial discrimination but on one's net worth, and that is the basis of the discrimination in that country. Perhaps this is one of the reasons why the French wealth tax has been more successful. If the tax is based on race or past wrongs, it can lead to resentment, and with the already tense undercurrent of racial division in this country, there could be an explosion or a continued undercurrent of hatred and retaliation in underlying ways. This is something to consider as the call for a wealth tax in South Africa is based on redressing the actions of a particular race that were performed in years past, or even just on the basis of having benefited from apartheid due to the colour of your skin.

France, as I pointed out earlier, has indicated that it may tax the super rich at 75%. What effect this will have on their economy can only be negative unless there has been forethought of some sort that I have not considered. One has to consider how much each person in South Africa is worth *per capita*, and if this suggested wealth tax is viable. The majority of people in South Africa struggle just to meet their monthly needs and should a wealth tax be induced, the cap amount will have to be much higher than the one given by France.

The French wealth tax only taxes personal assets and not business assets; perhaps this is why France has managed to maintain its economy and has not been so significantly affected by its capital and brain drain. One must consider if there are many individuals with personal assets that are so distinctive that they are worth taxing.

Regardless of race, I doubt we have that many people who are super rich, and this tax may end up affecting the middle class and lower income earners. If it is to be a temporary tax based on race, then the middle class income earners who are of the white race will definitely be affected. One should also consider that due to Basic Economic Empowerment and Affirmative Action, many white males are struggling to find employment, despite their so called privileges from the apartheid era. The wealth tax just based on this would be unfair because institutions such as BEE and AA are already a form of redress. One must not encourage prosperity in this country by causing one race to become poor at the expense of another.

6.4.2 India and South Africa

India is a developing country like South Africa. It has an extensive wealth tax act as described above in the chapter on India. India has had problems with discrimination and inequality like South Africa, but it has, however, not based its wealth tax on this. Some people were described as “untouchables” or put into a lower class or caste system, but interestingly enough, taxation has not been used to redress these injustices.

India is one of the fastest growing countries in the world. It is also a developing country and perhaps we can learn from its economic and taxation policies. It has been independent for longer than South Africa, and has had a greater time and opportunity to make mistakes, experiment, and grow. One must take note that India has a large rural population, like South Africa. India derives much from its agricultural resources. Its wealth tax defines what is taxed, and at what amount, so that there is no confusion or question as to what is taxed and at how much. This is a problem that Germany had and it led to the abolishment of their wealth tax.

The Indian wealth tax is levied at 1% for Rs. 15 Lacs. I have noticed that 1% seems to be a common margin with wealth taxes. The suggested wealth tax in Germany is also at 1% of assets over 2 million Euros. Perhaps the Indian wealth tax is low enough for the wealthy not to feel it, and high enough to bring in significant revenue, as suggested by the economists in Germany. Perhaps South Africa needs to consider this principle when considering the establishment of a wealth tax and thus a negative reaction may be reduced. The wealth tax seems to be working for India. India has a large gap between the rich and the poor. India's Constitution demonstrates that their goal is to create a welfare and socialist state through democratic means. This would explain the wealth tax, but the classification of persons also meant that there were some who were very rich and others who were very poor. The taxation system in India seems to provide enough revenue for a welfare state to be potentially established. South Africa is a developing country too, with the potential to be a welfare state, and much can be learned from India.

India has problems with corruption just like South Africa, but has somehow managed to grow despite this. Perhaps corruption will stunt their growth at some point, or maybe the corruption does not extend to the taxation system. Should it extend to the taxation system, maybe they make more than enough revenue to cover the shortfall from whatever is stolen.

6.4.3 Germany and South Africa

Germany is a developed country, and unlike France it does not levy the wealth tax anymore, although it is under consideration to re-implement due to the effects of the economic recession. One more difference is that the French wealth tax only taxes personal assets, whereas the German wealth tax was on natural and legal persons. South Africa and Germany are quite different. Germany is a developed country that is a federation and South Africa is a developing country which is not a federation. Both countries, however, have Constitutions and have had racial issues. The Constitutions of both countries have an emphasis on equality.

The German wealth tax was abolished due to being found to unfairly discriminate; i.e. it did not promote equality. The other reason was that it discriminated against those that had wealth transferred to them; i.e. inherited it, and it was not fair for those that wanted to pass on their possessions in the family. The other issue was the application of the tax; the tax values were different from market values. South Africa is a country that takes equality seriously, given our background.

It is likely that a wealth tax based on race could potentially be found to be un-Constitutional, considering section 9 of the Bill of Rights. With the Constitution in mind and the progress that has been made over the years at attaining equality in all spheres, this could potentially be a step back for South Africa. Germany's wealth tax did not function on its own. It was read in conjunction with the Valuation Act. Both Acts have since been repealed. As stated earlier, the wealth tax could not have brought much revenue initially for it to be reconsidered some 15 years later.

One must consider that France, India and Germany had wealth taxes established for an indefinite period of time. Those asking for a wealth tax in South Africa are requesting a temporary one that will be applied annually for perhaps two years. One must differentiate between the effectiveness of a temporary wealth tax and one indefinitely applied. The temporary one will boost revenue for that short period of time, but what happens after that?

Will the government for those two years not get used to that influx of cash and will they not feel the difference after the tax has reached its tenure? Where, and how, will they replace the revenue previously received from this tax? This can only mean that another tax or other taxes will be introduced to replace that shortfall. In establishing a wealth tax in South Africa, much still needs to be considered. It will definitely take a few years before it can even begin to be implemented, and the cost of the administration, which seems to be a fundamental factor, must be considered. The wealth tax question is not as simple as it has been made out to be; many issues are yet to be considered.

6.5 DOUBLE TAXATION

Stiglingh *et al.*¹⁵⁰ note that South Africa applies a residence-based (or worldwide) system of taxation. Many countries, including the ones the ones in my study, utilise this system of taxation. This means that a resident or a non-resident can be taxed on the same income or assets twice. This is unfair, and thus there are treaties that regulate this.

These treaties are known as Double Taxation Agreements (DTAs) and are binding on party states. Most DTAs are drafted according to the OECD model. The OECD is not a legal body that can enforce its provisions and only member states are bound to it, although there is no method of enforcement should any party default. In South Africa, DTAs are binding and are enacted into law upon being published in the Government Gazette. This means that they become a part of domestic law and must be adhered to.

When dealing with wealth taxes, the taxation is on one's net worth of assets and this will include assets all over the world. This means that your assets, or rather you, may be taxed twice. In France, there are DTAs, like the one I mentioned with India that governs what happens in these circumstances. These DTAs apply the exemption, credit and deduction method to prevent double taxation.

¹⁵⁰ Stiglingh *et al.* (Eds). *Silke: South African Income Tax 2012*. Durban: Lexis Nexis, pp. 57.

The exemption method is when an individual is exempted from a tax that they have to pay in another country. The credit method is when an individual or company is given a credit or credited for the tax they have already paid in another country. The deduction method is when an individual or company receives a deduction for the tax paid. The credit method is said to be the most beneficial to tax payers.

France's Constitution allows for agreements to be concluded with other countries, or International Agreements as they are called. India's Constitution also allows for International Agreements to be concluded, and the current government is improving international relations. The previous government was not well established in that area and their involvement in nuclear activity caused them to be isolated from a number of nations. This has since improved, and as seen from the examples of the DTAs concluded with France and Germany, double taxation is taken seriously. The Indian wealth tax is also applied on a worldwide basis, and it is thus important for DTAs to be concluded.

The German Constitution also allows for International Agreements. It gives the president the power to enter into International Agreements. These International Agreements are binding on the state and prevent double taxation. Germany does not have a wealth tax anymore, and should one be implemented, the worldwide system of taxation will apply. Despite this, other taxes that are levied in Germany can lead to double taxation as the overall tax system on residents is the worldwide system, and on non-residents the source-based system.

South Africa, on the other hand, also implements a worldwide system application on residents and a source-based system on non-residents. South Africa does not have a wealth tax yet, and it has just been suggested that one be implemented. The purpose of this study is to indicate if such implementation can occur and if it will be beneficial to this country. Thus the DTAs will not apply to a wealth tax, but rather to other taxes that may lead to double taxation.

The South African Constitution gives authority for the signing of International Agreements to the National Executive. Section 231 of the Constitution states that:

- (1) *The negotiating and signing of all international agreements is the responsibility of the national executive.*
- (2) *An international agreement binds the Republic only after it has been approved by resolution in both the National assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)*
- (3) *An International agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.*
- (4) *Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*
- (5) *The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.¹⁵¹*

Section 231 gives the Constitutional scope of DTAs, and as can be seen from this section, these agreements are binding on South Africa unless inconsistent with the Constitution.

Section 232 of the Constitution goes on further to say that, “*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*”.

¹⁵¹ Section 231 of the Constitution of 1996.

This section implies that South Africa must adhere to customary international law, but the Constitution is the supreme law of the land and should the international law not be in line with this, then it cannot be applied.¹⁵²

Section 233 of the Constitution¹⁵³ states that,

“When interpreting legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with the international law.”

This binds South Africa into taking into consideration international law when interpreting any law.

South Africa may not have a wealth tax yet, but should we enact it, then we are required to take Double Taxation Agreements into consideration and are bound by them on application. We are still bound to DTAs on application of other taxes, and the Income Tax Act in section 108 (2) seals the ideal behind being bound to these agreements and initiates them as domestic laws to be applied as such.

6.6 THE BENEFITS AND DISADVANTAGES OF IMPLEMENTING A WEALTH TAX IN SOUTH AFRICA AS GLEANED FROM FRANCE, INDIA AND GERMANY

France’s wealth tax has lasted a number of years. It seems as though this tax is working for it, as France has one of the strongest economies at the moment and has comfortably dealt with the 2008 – 2012 recession without as much devastation as other European nation; developed and undeveloped. France’s wealth tax seems to be quite comprehensive although not as comprehensive as India’s.

¹⁵² Section 232 of the Constitution of 1996

¹⁵³ Section 233 of the Constitution of 1996

This has perhaps assisted in the maintenance and effective application of the wealth tax in France. Germany had problems with the application and administration of the tax. The values were inconsistent with market values and this led to the tax being abolished as it was found to be unconstitutional. India, on the other hand, like France, administers the tax and its Act well which has resulted in economic growth.

What I have gleaned regarding the advantages of a wealth tax are as follows:

- It reduces the gap between the rich and the poor by levying higher taxes on the rich and lessening the tax burden on the poor.
- It brings in additional revenue.
- It encourages those with dormant wealth to contribute to the economy by forcing them to become economically active so as to increase their finances due to losses from taxation.
- It increases employment as the parties that become economically active will require labour. This in turn also lowers the gap between the rich and the poor.
- The tax burden is lowered as more people are employed and will therefore require less assistance from the government.
- It raises social consciousness by forcing the rich to consider the plight of the poor.
- It can assist in reducing government debts and deficits.

The disadvantages of a wealth tax are the following:

- It leads to capital and brain drains.
- Tax evasion becomes an option as individuals and companies feel they are being taxed too much.
- It can amount to over taxation of an already heavily taxed society.

- It may be deemed as a form of inequality as the extra taxation of the rich based on their financial status may not be fair.
- It has high administrative costs for the individual and for the state, and this may lead to a loss in assets and an eventual lowering of the tax that can be collected, and in the end less revenue.

In an article on wealth taxes in the Euro area, it is stated that, “*The grounds of unsatisfactory fiscal efficiency due to the high costs of collection, as well as the risk of negative effects on savings and investment activity*”¹⁵⁴ This what causes a wealth tax to be undesirable.

6.7 OVERVIEW

There seem to be more benefits from the levying of a wealth tax than there are disadvantages. With the introduction of any tax there will be a negative connotation to it as there are few people willing to part with their money for causes where they do not see a specific return.

In considering South Africa, the wealth tax that people have in mind is a temporary one that is applied annually for two years or so. This may not have the effect of the disadvantages as mentioned above, but one disadvantage is that the principal of equality will be contested, although individuals such as Adam Smith see it as part of equality for those who benefited unjustly or even those who are just better off to assist the weak and those who have less. Seeing as it was Desmond Tutu that began this debate and he is a religious man, it can be understood that he would think as Adam Smith as a religious man, regardless of what religious reasons are advocated for the assistance of the poor.

¹⁵⁴ Brauning, D. (2012). *Income and Wealth Taxes in the Euro Area, An Initial Overview*. Available at http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000292966/Income+and+wealth+taxes+in+the+euro+area%3A+An+initial+overview.PDF.

Another problem is that resentment would build up between the races, and we will always have one race blaming the other for its woes; thus the spirit of reconciliation would be lost to this country and to the younger generations. Africa already has much turmoil and tension and we do not want to end up as another African country with no peace. It may potentially be true that the white race, even the younger ones, have benefited directly and indirectly from apartheid, but one needs to look at the bigger picture and what the consequences of levying this tax could bring about. Perhaps a temporary tax at a lower rate would not amount to much loss to the individuals concerned; however, people's dignities may be impaired and it does not matter how little the payment is, it may have great repercussions.

According to Thuronyi,¹⁵⁵

In particular, the wide disparity of wealth found in many developing countries may exacerbate political and social problems. Legacies of colonialism and authoritarianism may include popular beliefs, whether justified or unjustified, that economic elites gained their position through illegitimate means. Such economic elites may tend to be grouped in definable religious, ethnic or racial groups, exacerbating tensions among such groups. A special wealth tax on these groups may work to reduce tensions.

Victor Thuronyi has a different view from me, stating that a wealth tax would perhaps ease the racial tensions in South Africa and the feeling that the white race benefited at the expense of the black race during apartheid.

Should an indefinite tax be levied on all races, but at a certain amount of net wealth, this would be understandable. France has benefited from the wealth tax. It could have been argued that France is a developed country but India is a developing country and seems to be doing well with their wealth tax.

¹⁵⁵ Thuronyi, V. (1996). *Tax Law and Drafting*. In Taxation of Wealth, vol. 1 chapter 10. International Monetary Fund (ed.). Washington DC: IMF.

I added India for the reason that it is a developing country. Thuronyi¹⁵⁶ goes on to say that, “*Taxes on net wealth have been deemed too impractical, particularly in developing countries*”. Apparently uncovering the true ownership of wealth and determining net values could prove to be difficult. These are problems that could be faced in developed countries as well. Although we could potentially suffer from capital and brain drains which we cannot afford to in this economic climate and in our pursuit of the development of a welfare and socialist state, we may teach people to live off handouts rather than uplifting their own lives. It may be better to teach one to fish and to give them a fishing rod, rather than giving them fish because you will do this for the rest of their lives, as the popular saying goes.

The wealth tax has been said to lead to the capital drain. In an article on wealth tax and entrepreneurial activity, it has been said,¹⁵⁷

The wealth tax is likely to influence entrepreneurship negatively, by affecting the pool of capital available to start up businesses as well as reducing the net return to successful entrepreneurship... Indeed OECD countries that levied a wealth tax in 2003 had 33% lower self employment rates than those that did not have a wealth tax... First because of the high risk and asymmetric information it is difficult for small start up businesses to obtain external financing... Second; expected income is an important driving force for potential entrepreneurs. By decreasing the expected returns to successful entrepreneurship, the wealth tax may hence, negatively impact the probability of seeking to become one.

This is in direct contravention with the idea that the wealth tax forces economic activity. It may in turn reduce it, and with high unemployment rates, it is important for entrepreneurship to be taken up.

¹⁵⁶ Thuronyi, V. (2003). *Comparative Tax Law*. Alphen aan den Rijn: Kluwer Law International.

¹⁵⁷ Hansson, A. (2006). *The Wealth Tax and Entrepreneurial Activity*. Available at <http://www.nek.lu.se/NEKAHA/Research/Wealth%20tax%20and%20entrepr.pdf>.

The wealth tax may increase revenue but that revenue may not be utilised or administered in the proper manner. With corruption and mal administration of the current finances, there is no point in taxing people more if the money will not be administered well. The Limpopo Province issue is a good example of this. Germany has already shown us that the administration of a wealth tax may be difficult, and if we cannot manage the simple things that we have now, this may become more of a burden rather than a means of assisting the people. The administrative costs of the tax may not be affordable by the government and individuals in the nation. We do not want a situation like France where middle class earners begin to be affected by the wealth tax due to the cap amount legislated. As Thuronyi states, “*Ultimately, the decision whether to enact a tax or taxes on net wealth or wealth transfer must take into account the country’s political, social and administrative circumstances*”.¹⁵⁸

In conclusion, I understand the reasons why a wealth tax seems attractive but I think that people are already over burdened with taxes, and as someone who just finished university and started working, one wants to see their hard work pay off, instead of watching most of your earnings go to the Receiver of Revenue without definite results or benefits to oneself for what the money is collected for.

¹⁵⁸ Thuronyi, V. (2003). *Comparative Tax Law*. Alphen aan den Rijn: Kluwer Law International.

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